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# Supreme Court of the United States

October Term, 1974
No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
*Petitioners*,

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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# Supreme Court of the United States

**October Term, 1974**
**No. .....**

THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
**To the Supreme Court of Ohio**

Petitioners, The City of Eastlake, Ohio, and The City Planning Commission of The City of Eastlake, respectfully pray that their Petition for a Writ of Certiorari be granted to review the final judgment and opinion of the Supreme Court of the State of Ohio, entered in this case on March 19, 1975, upon which petitioners' petition for rehearing was denied on April 17, 1975.

## OPINIONS BELOW

The judgment and opinion of the Supreme Court of Ohio, reported at 41 Ohio St. 2d 187, 324 N.E.2d 740, appears in Appendix A to this Petition, p. 13. The Eleventh District Court of Appeals of Lake County Opinion, which is not reported, appears in Appendix B hereto at p. 39. The Lake County Court of Common Pleas Opinion, also not reported, appears in Appendix C, p. 45.

## JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 19, 1975. A timely filed petition for rehearing was denied on April 17, 1975, and this Petition for Certiorari was filed within ninety days.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

## QUESTIONS PRESENTED FOR REVIEW

1. Whether an automatic voting procedure, whereby the electorate of a community, by neutral referendum vote, exercise a power of veto over legislative acts of its representatives in rezoning of land, is violative of the due process clause of the United States Constitution.

2. Whether the automatic and mandatory referendum voting procedure provided for by the Eastlake City Charter, under the Home Rule Provisions of the Ohio Constitution, requiring that any ordinance changing land use must first be approved by the voters in a city-wide election at a general or special election prior to becoming finally effective, is violative of the due process clause of the Fourteenth Amendment to the United States Constitution as decided by the Supreme Court of Ohio.

3. Whether the mandatory referendum procedure provided for by the Eastlake City Charter, for democratic decision making by the electorate as a whole in respect to changing land use, constitutes unlawful delegation of legislative power to the people in violation of the due process clause of the United States Constitution.



## CONSTITUTIONAL AND CITY CHARTER PROVISIONS INVOLVED

**United States Constitution, Fourteenth Amendment:**

"§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**Charter of the City of Eastlake:**

Article VIII—Section 3 of the Charter of the City of Eastlake provides in pertinent part, "That any change to the existing land uses * * * cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the City council should approve any of the preceding changes, or enactments, whether or approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. Said issue

shall be submitted to the electors of the City only after approval of a change of an existing land use by the Council for an applicant, and * * *".[1]

## STATEMENT OF THE CASE

### A. Factual Background

The facts are not in dispute. Respondent, Forest City Enterprises, Inc., an Ohio Corporation, owner of an eight (8) acre parcel of property in Eastlake, Ohio, on May 18, 1971, applied to the Eastlake Planning Commission for rezoning of its property from industrial to high rise apartment use classification.

Thereafter, the application of respondent was processed and approved by the City Planning Commission and on December 28, 1971, the Council of the City of Eastlake enacted Ordinance No. 1971-168, which provided for the requested change in zoning classification for the property in question.

In the meantime, an Amendment to the Eastlake City Charter had been placed on the ballot by initiative petition and was adopted at the general election on November 2, 1971. The Charter Amendment in question provided that no ordinance providing for change in land use in the City of Eastlake would become finally effective unless and until

1. For full text of pertinent Eastlake Charter provisions, see Appendix D, p. 48.



approved by a 55% majority vote of the voters in a city-wide referendum election.[2]

In May, 1972, an election was held and the Ordinance providing for the rezoning of respondent's property failed to obtain the requisite 55% affirmative majority of the votes cast.

### B. Proceedings Below

Respondent filed for declaratory judgment and injunctive relief in the Court of Common Pleas of Lake County, Ohio, claiming the mandatory referendum voting procedure required by Article VIII, Section 3 of the Charter of the City of Eastlake, in respect to land change use, was unconstitutional as it denied respondent due process of law under the Ohio and United States Contitutions, and was violative of the referendum provisions of the Ohio Constitution.

The case was submitted to the trial court upon the complaint and answer, with certain stipulations of counsel as to the applicability of certain ordinances of the City of Eastlake and provisions of the Eastlake Charter. No evidence was introduced by either side.

The decision of the Court of Common Pleas, which found the mandatory referendum voting provisions of the Eastlake Charter in respect to land use change not to be

2. The Supreme Court of Ohio made no finding that the 55% majority vote requirement would stand as an impediment to the Constitutional validity of the Eastlake Charter referendum procedure as similar restrictive election requirements can be found in the Ohio statutes, e.g., R. C. 139.02 (for issuance of federal aid bonds); R. C. 133.16 (for issuance of bonds for reconstruction of bridges); R. C. 1515.04 (creation of soil and water conservation district); and R. C. 5705.191 (approval of excess tax levy).

in violation of respondent's constitutional rights, was later sustained by the Eleventh Appellate District Court of Appeals of Lake County, Ohio, in which the respondent raised the same Constitutional issues by assignment of error.

Thereafter, the respondent perfected appeal to the Supreme Court of the State of Ohio, and the Court in its Decision of reversal, found the mandatory referendum voting procedure of the Eastlake Charter for land use change, constitutes an unlawful delegation of legislative power to the electorate in violation of the Fourteenth Amendment to the United States Constitution.

The Decision of the Ohio Supreme Court, which significantly affects the right of the referendum in the City of Eastlake, as well as in seventeen (17) adjacent communities,[3] stands alone, as no other case can be found wherein the provisions for automatic referendum *itself* is found to be violative of the Federal Constitution.[4]

Thereupon, appeal was perfected to this Court.

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3. Seventeen communities in the greater Cleveland area, having a total population of 276,077, according to the 1970 population census, have adopted varying concepts of the automatic referendum procedure in respect to land use changes similar to the Eastlake provision.

4. The case of *Hunter v. Erickson*, 393 U.S. 385, involving the mandatory referendum provision of the City of Akron Charter, is readily distinguishable as the intent and purpose of the Akron law was found by the Court to be discriminatory against racial minorities. The automatic referendum voting process itself, as provided for by the Akron Charter, was not condemned. The Eastlake Charter referendum provision does not rest on "distinctions based on race" as in the *Hunter* case.



## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

**1. The State Court relied upon and wrongly interpreted decisions of this Court in finding that the automatic referendum voting procedure provided for by the Eastlake Charter in respect to land use changes, is violative of the due process clause of the Federal Constitution.**

The majority of the Ohio Supreme Court relied upon and wrongly interpreted the Decisions of this Court set forth in *Washington, ex rel. Seattle Trust Co. v. Roberge* (1928), 278 U.S. 116 (local consent requirement for philanthropic home); *Thomas Cassack Co. v. Chicago* (1917), 242 U.S. 526 (local restriction of signboards); and *Eubank v. City of Richmond* (1912), 226 U.S. 137 (local consent to street building line restriction), all of which cases involve the necessity for legislative procedural safeguards, where neighborhood land use restrictions are sought to be imposed. The procedural and substantive safeguards, to which reference is made in these cases, have no application where the voting issue is submitted to the electorate as a whole as provided for by the Eastlake Charter.

The referendum provided for by the Eastlake Charter is far more than an expression of neighborhood preference, it is the City itself, legislating through its voters, an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what best serves the public interest. See *Spaulding v. Blair* (4th Cir. 1968), 403 F.2d 862.

Respondent, Forest City Enterprises, Inc. made no challenge, nor does the record indicate, that the Eastlake Charter provisions discriminate against racial or economic

minorities.[5] Here, it is the claim that the local referendum procedure *itself*, which requires that questions be submitted to a vote of the electorate, violates the due process clause of the Federal Constitution. The question in this case is whether the mere requirement that a question be put to the electorate violates the Constitution.

**2. The Decision of the State Court is in conflict with the principles of this Court decided in James v. Valtierra, 402 U.S. 137 (1971).**

The Ohio Constitution, since 1912, has reserved to the people of each municipality the power of referendum on all questions involving legislative action, together with all powers of local self-government.[6]

In Ohio, the power to zone, or to change land use zoning classification, is a legislative function. *Donnelly v. Fairview* (1968), 13 Ohio St. 2d 1 and as such, is subject to the referendum process. *Hilltop Realty v. South Euclid* (1960), 110 Ohio App. 535. The referendum process of a municipal corporation may be determined by its local Charter provisions which may be less restrictive, or more restrictive than the procedure established by general law

5. Respondent, Forest City Enterprises, Inc., in its brief in the lower court, stated that it does not challenge the Eastlake Charter provision on any basis dealing with discrimination, intent, effect, or express provision against racial or economic minorities.

Claim that the Eastlake Charter provision interfered with "National Housing policies" and "Constitutional rights of travel" were brought into the case for the first time in an Amicus Curiae brief filed by "Lawyers for Housing" in the Ohio Supreme Court.

6. The Constitution of the State of Ohio, Article II, Section 1(f) provides, "* * * referendum powers are hereby reserved to the people of each community on all questions which such municipalities may now or hereafter be authorized to control by legislative action * * *" who may, under Section 7 thereof, "frame and adopt or amend a charter for its government and * * * exercise thereunder all powers of local self government."



for its procedure for submission of referendum vote to its electors. *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St. 2d 147.[7]

The same mandatory referendum procedure was at issue in *James v. Valtierra* (1971), 402 U.S. 137, whereby the State of California by constitutional amendment reserved to the electors of its counties and cities the power of referendum over the acts of its local government bodies in respect to low rent housing.

This Court, in sustaining the automatic referendum procedure, found that such provisions for referendum, which are neutral in application to all electors in the community demonstrates devotion to democracy and ensures that all the people of a community will have a voice in a decision which will affect the future development of their own community, and that such referendum procedure does not violate the Federal Constitution. The principles of this Court set forth in the *Valtierra* case clearly control in the instant case.

**3. Referendum is a fundamental part of the local legislative process and, being founded on neutral principles, should be exempt from Federal Constitutional restraint.**

The majority of the Ohio Supreme Court, in its Decision and Opinion, determined that the inquiry is "whether Eastlake's mandatory referendum provision allows the exercise of legislative power by the voting public such

7. The Supreme Court of Ohio made no finding that the automatic referendum voting provision of the Eastlake Charter was invalid as contrary to the general laws and referendum provisions of the Ohio Constitution as urged by Forest City Enterprises, respondent herein.

that zoning regulations *might* be imposed which are arbitrary and unreasonable." (Italics supplied.)

Respondent, Forest City Enterprises, Inc. did not claim, and the Court did not determine, that the land use restrictions as applied to respondent's particular property by the City of Eastlake were unreasonable, arbitrary or confiscatory.

Land use decisions, in the first instance, are political in nature and entrusted to local control under the political powers, and if reasonable, do not take property without due process of law. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365. If, after the final decision has been made (by counsel, or by automatic referendum vote of the electorate), the restrictions placed upon respondent's property are unreasonable, then a Court challenge may be based upon the applicable specific facts as decided by this Court in the *Ambler Realty* case.

The referendum procedure is a fundamental part of the State's legislative process and, being founded on neutral principles, should be exempt from federal constraints. *Ranjel v. Lansing*, 417 F.2d 321, 324, cert. den. 397 U.S. 980 (1969).

The judgement of the State Court below places in jeopardy the democratic process whereby the electors reserve unto themselves the right of veto of the legislative acts of their elected officials as to land use changes by which the future development of their City will be determined (*James v. Valtierra, supra*), including the enjoyment of environmental land use planning (*Southern Alameda Spanish Speaking Organization v. City of Union City, Cal.*, 424 F.2d 291 (1970) and the protection and improvement of the quality of life of its residents (*Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).



The issue in this case transcends zoning. The assault on the referendum process provided for by the Eastlake Charter is a manifestation of a new distrust of democracy and democratic processes in favor of an elitism that considers itself a wiser guide for the solution of economic and social policies, an elitism contemptuous of the wisdom and fairness of the ordinary voter who, it is claimed, *might* impose unreasonable restrictions on respondent's property. This distrust is disturbing as it seizes on the "due process clause" to denounce a neutral and traditional democratic process itself as being prohibited by the Federal Constitution.

The ultimate decision in this case will have far reaching effects, not only to the citizens of the City of Eastlake and numerous other adjacent municipalities directly affected, but also to other municipalities throughout the United States who may seek to control land use change by the automatic referendum voting procedure whereby the people elect to locally control the development of their community, in the first instance, by a mandatory vote of the electorate prior to any land use change becoming finally effective.

## CONCLUSION

For the foregoing reasons, it is respectfully prayed that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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## APPENDIX A

**Opinion of the Supreme Court of Ohio**

(Decided March 19, 1975)

No. 73-901

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

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FOREST CITY ENTERPRISES, INC.,
*Appellant,*

vs.

CITY OF EASTLAKE, *et al.*,
*Appellees.*

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1. Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are "authorized by law to control by legislative action." (Paragraph one of the syllabus in *Myers v. Schiering*, 27 Ohio St. 2d 11, approved and followed.)

2. A municipal charter provision, which requires that any ordinance changing land use be ratified by the voters in a city-wide election, constitutes an unlawful delegation of legislative power, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Appellant is an Ohio corporation, and the owner of an 8-acre parcel of real property in Eastlake, Ohio. On May 18, 1971, appellant applied to the Eastlake Planning Commission for the rezoning of its property from industrial to multi-family, high-rise use. The Planning Commission approved the application, and on December 28, 1971, the Eastlake City Council amended Eastlake's comprehensive zoning ordinance to permit the requested use.

On April 6, 1972, appellant applied to the Planning Commission for parking and yard approval, a preliminary step to obtaining a construction permit. The Planning Commission denied the permit because appellant had failed to obtain voter approval of council's amendment to the comprehensive zoning ordinance, as required by Section 3, Article VIII of the Eastlake City Charter.[1] That provision requires any ordinance which changes existing land use to be approved by a 55 percent vote in a city-wide election, the cost to be borne by the applicant-landowner.

In May 1972, such an election was held, but the ordinance rezoning appellant's property failed to obtain the requisite 55 percent of the votes cast.

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1. On May 18, 1971, appellant made application to the Planning Commission for rezoning. While appellant's application was pending, initiative petitions were circulated, and a proposal requiring voter approval of all land use changes placed on the ballot. On November 2, 1971, Section 3, Article VIII of the Eastlake charter was adopted.

Subsequently, appellant's application was approved by the Planning Commission, and on December 28, 1971, city council amended the comprehensive zoning ordinance.

In the Court of Common Pleas, appellant contended that because Eastlake's charter was amended while appellant's application for rezoning was pending the charter amendment did not apply to appellant. The trial court rejected this contention, and appellant neither assigned the ruling as error nor argued it upon appeal.



Subsequently, appellant filed a declaratory judgment action in the Court of Common Pleas, asserting that Section 3 of Article VIII was unconstitutional. Appellant contended that the voter-approval requirement, as a prerequisite to any land use or zone change, denied appellant due process of law, and further, violated the referendum provisions of the Ohio Constitution. Appellant also attacked the validity of the provision requiring 55 percent approval and the provision requiring that election costs be borne by the applicant-landowner.

The Court of Common Pleas upheld the validity of the voter approval and 55 percent requirements, but held the provision requiring an applicant-landowner to pay the election costs unconstitutional. Upon appeal and cross-appeal the Court of Appeals affirmed the judgment of the Court of Common Pleas.

The cause is now before this court pursuant to the allowance of a motion to certify the record.[2]

PAUL W. BROWN, J. Appellant challenges the validity of Section 3, Article VIII of the Eastlake City Charter, which provides that no ordinance changing land use becomes effective until ratified by 55 percent of the voters in a city-wide election. Because such provision denies appellant due process of law, we hold it unconstitutional.

I

Since *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, the constitutionality of zoning has not been ques-

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2. Appellee did not file a cross-appeal from the judgment of the Court of Appeals. Thus, the Eastlake charter provision requiring an applicant-landowner to bear the costs of the mandatory election is not before us.

tioned. Modern authorities agree that some restrictions on the use of land are essential to orderly community development. But because the power to zone infringes upon the individual use of private property, the exercise of such authority has been carefully hedged with procedural and substantive safeguards. To be sustained as valid, a zoning ordinance must be comprehensive in nature, must bear a reasonable relationship to the public health, safety, welfare, or morals, and must provide for the amelioration of unnecessary hardships imposed upon the owners of specific property.

In Ohio, the power to zone or rezone, via the passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function. *Berg v. Struthers* (1964), 176 Ohio St. 146; *Tuber v. Perkins* (1966), 6 Ohio St. 2d 155; *Donnelly v. Fairview Park* (1968), 13 Ohio St. 2d 1. See also, Justice Corrigan's concurrence in *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23, 31. As such, the zoning or rezoning of property is subject to the referendum process. *Hilltop Realty v. South Euclid* (1960), 110 Ohio App. 535.

Grants of relief from unnecessary hardship, on the other hand, are classified as administrative acts, regardless of the label placed on them. *Donnelly v. Fairview Park, supra; Myers v. Schiering* (1971), 27 Ohio St. 2d 11. See also, Justice Corrigan's concurrence in *Mobil Oil Corp. v. Rocky River, supra.* This is so because the action executes or administers a zoning ordinance, rather than brings it into existence. *Donnelly v. Fairview Park, supra.* Whether such administrative relief is provided by council, acting in an administrative capacity, or by an administrative zoning board, created pursuant to R. C. 713.11, the proper route of appeal is to the Court of Common Pleas, via R. C. Chapter 2506. The power to referend an administrative zoning determination, by whatever body made, has long since been foreclosed. *Myers v. Schiering, supra.*



## II

Section 3, Article VIII of the Eastlake charter sets forth the procedures prerequisite to a zone or land-use change in that city. Those procedures specifically govern "any change" in existing land use, or "any change whatsoever to any ordinance," or "the enactment of any ordinance," affecting the use of land. Several steps are required to effectuate a proposed change.

First, the proposed change must be submitted to the City Planning Commission which has the power to approve or disapprove the change. Next, regardless of the action taken by the Planning Commission, the proposal goes to city council, which may approve or disapprove. Finally, if the approval of council has been obtained, the proposed change must be ratified by 55 percent of the voters of Eastlake, at the next regular municipal election, or at a special election falling on the generally established election day. The cost of this required election, including the cost of the requisite advertising, must be borne by the applicant. In their briefs, and during oral argument, the parties have characterized the election requirement as a "mandatory referendum."

Under the provisions of Section 3, Article VIII, *all* changes in land use require approval by city council. On its face, the charter provision makes no distinction between those changes made by council in an administrative capacity, and those made by council in a legislative capacity. Thus, the requirement of a mandatory referendum falls upon all changes with equal weight. Insofar as this purports to mandate a referendum as to an administrative determination, it is clearly invalid. *Myers v.*

*Schiering, supra; Kelley v. John* (1956), 162 Neb. 319, 75 N.W.2d 713.

Paragraph one of the syllabus in *Myers* states: "Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are 'authorized by law to control *by legislative* action.'"

However, construing the mandatory referendum requirement as applying only to those land-use changes granted by council acting in a legislative capacity, we must determine whether such a requirement denies appellant due process of law.

III

Appellant has not claimed, nor does the record indicate, that the zoning of appellant's 8-acre parcel for industrial use is unreasonable and unconstitutional. Rather, appellant's narrow claim is that Eastlake's charter provision constitutes a delegation of legislative power to the people, and *as such* violates the requirement that the police powers be exercised in a reasonable and unarbitrary fashion. The focus of our inquiry, then, is whether Eastlake's mandatory referendum provision allows the exercise of legislative power by the voting public, such that zoning regulations might be imposed which are arbitrary and unreasonable.

The Supreme Court of the United States has addressed this issue. In *Eubank v. Richmond* (1912), 226 U.S. 137; *Thomas Cusack Co. v. Chicago* (1917), 242 U.S. 526; and *Washington, ex rel. Seattle Title Trust Co. v. Roberge* (1928), 278 U.S. 116, that court established guidelines by which an appropriate due process determination might be made.



In *Eubank*, a Virginia statute authorized city and town councils to enact regulations concerning the building of houses, including the establishment of building lines. Pursuant to such authority, Richmond's city council passed an ordinance providing "that whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line * * *." Two-thirds of the property owners on plaintiff's block filed such a request, and a building line was subsequently established. When plaintiff challenged that action, the Virginia courts sustained both the statute and the ordinance, finding neither "unreasonable nor unusual."

The United States Supreme Court reversed, holding the ordinance to be an unlawful delegation of legislative power. In analyzing the facts, the court declared, at 226 U.S. 143-144:

> "It [the Richmond ordinance] leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no

standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed in the same locality. * * *

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. * * *"

In *Cusack*, a Chicago ordinance prohibited the erection of any billboard or signboard in any block "in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners * * * owning the majority of the frontage of the property on both sides of the street in any block in which such billboard or signboard is to be erected * * *." Plaintiff, relying on *Eubank*, challenged the ordinance as an unlawful delegation of legislative power, but the Supreme Court of Illinois upheld the enactment, and the United States Supreme Court affirmed.

The court drew a sharp distinction between *Eubank* and *Cusack*, because the facts presented were significantly different. In *Eubank*, a reasonable use of property was prohibited by arbitrary fiat; in *Cusack*, an unreasonable use of property was prohibited by valid legislative action, subject to said prohibition's being lifted by those affected. As the court noted, at 242 U.S. 531:



"* * * [the *Eubank* ordinance] left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances."

Finally, in *Washington, ex rel. Seattle Title Trust Co., v. Roberge*, the trustee of a philanthropic home sought to replace an existing building with a new and enlarged structure, sufficient in size to lodge 30 persons. A Seattle ordinance, amending the city's comprehensive zoning scheme, permitted the erection of the structure as contemplated, but made such approval subject to the trustee's obtaining the written consent "of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." When the trustee failed to comply with the consent requirement, a permit to erect the new home was denied, and the validity of such action was affirmed by the state Supreme Court.

The United States Supreme Court reversed, holding that the consent requirement constituted an unlawful delegation of legislative power. The court distinguished *Cusack* by finding construction of the home in *Roberge* to be a reasonable use, subject to arbitrary prohibition via the

consent requirement, while the ordinance in *Cusack* prohibited an unreasonable use unless consent was given. At 228 U.S. 121-122, the court declared:

> "The right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo v. Hopkins*, 118 U.S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank v. Richmond*, 226 U.S. 137, 143. *Browning v. Hooper*, 269 U.S. 396."



The distinction to be drawn between the court's decisions in *Eubank* and *Roberge*, on the one hand, and the court's decision in *Cusack*, on the other, is this: A reasonable use of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public. Such a rule was announced by the Supreme Court of Delaware in *Myers v. Fortunato* (1920), 12 Del. Ch. 374, at page 375:

> "If the existence of the law depends upon the vote or act of the people it is an unconstitutional delegation of legislative power, but if the law is complete in and of itself the fact that it provides for the removal or modification of its prohibition by the act of those most affected thereby, does not make it a delegation of legislative power."

The facts in the present case parallel those in *Roberge*. Here, the city council of Eastlake, by appropriate legislative action, permitted the use of appellant's 8-acre parcel for multifamily high-rise apartments. But before such ordinance and the use there allowed could become effective, appellant was required to obtain the consent of 55 percent of Eastlake's voting public, in a mandatory referendum. No standards were established whereby that action would be reasonable, rational and unarbitrary. Nor, indeed, could any be. Applying the principles enunciated by the Supreme Court, the Eastlake referendum requirement denied appellant due process of law.

Due process of law requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against

the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government. *McGautha v. California* (1971), 402 U.S. 183, 256, 270. The Eastlake charter provision ignored these concepts and blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational. For these reasons, the provision clearly violates the due process clause of the Fourteenth Amendment.[3]

## IV

To support its proposition that Section 3, Article VIII of its charter is constitutional, appellee cites *James v. Valtierra* (1971), 402 U.S. 137. That case concerned a state constitutional provision requiring that no low-rent housing project be developed, constructed, or acquired by a state public body until approved by a majority of those voting at a community election. The Supreme Court upheld the validity of the provision, as an appropriate exercise in "democratic decisionmaking."

Reliance on *Valtierra*, as authority in this case, is misplaced. *Valtierra* did not concern zoning, but rather the approval or disapproval of low-rent public housing. The court deemed such a decision to properly involve community-wide policy-making and compared the requirement to similar mandatory referendums for approval of state con-

3. This holding makes is unnecessary to reach appellant's further contention that a cumbersome zoning process bears no rational relationship to a valid police power objective. In *Burt Realty Corp. v. Columbus* (1970), 21 Ohio St. 2d 265, we held that unnecessarily onerous administrative remedies need not be exhausted prior to seeking declaratory relief. A time-consuming and costly appellate process, designed solely to delay and discourage land-use changes, would present grave constitutional questions.



stitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexation. At page 143, the court declared: "This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues."

It can scarcely be contended that every proposed land use change, no matter how small, in a city with a population of 20,000, either involves or allows community-wide policy-making. Rather, most involve hardships affecting individual parcels of property, which must be alleviated to preserve the constitutional validity of the ordinance.

Appellees also cite R. C. 303.11, 303.12, 519.11 and 519.12, which provide for county and township zoning. R. C. 303.11 provides that a comprehensive zoning resolution, adopted by the county commissioners, shall not become effective until approved by a majority of the voting public. R. C. 303.12 provides that amendments or supplements to such resolutions become effective 30 days after adoption, unless petitions are signed by a requisite number of resident voters, requesting that such change be placed on the ballot. R. C. 519.11 and 519.12 contain similar provisions with regard to township zoning.

Those statutes are of no help in deciding the present case. The imposition of zoning in a state's rural area is a matter of substantial significance, restricting severely the individual use of land, and determining, perhaps permanently, the direction of future development. As such, it clearly involves that type of policy decision justifying approval by those affected. Amendments to rural zoning ordinances, on the other hand, are not subject to manda-

tory voter approval, but rather to permissive referendum elections, when a substantial number of resident voters feel sufficiently aggrieved to circulate the appropriate petitions. Such provision contrasts sharply with the Eastlake charter, and thus is free from the deficiencies implicit in an unlawful delegation of legislative power.

We hold that the mandatory referendum provision of Section 3, Article VIII of the Eastlake charter constitutes an unlawful delegation of legislative power, thereby denying appellant due process of law. Whether the zoning of appellant's property for industrial use is reasonable, or whether the city of Eastlake has unlawfully attempted to exclude low and moderate income housing,[4] we do not decide. The judgment of the Court of Appeals, affirming the validity of the mandatory referendum and 55 percent approval provisions of the Eastlake charter, is reversed.

*Judgment reversed.*

O'NEILL, *C. J.*, HERBERT, STERN and W. BROWN, *JJ.*, concur.

CORRIGAN and CELEBREZZE, *JJ.*, dissent.

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4. An *amicus curiae* brief, filed by Lawyers for Housing, contends that Eastlake's mandatory referendum provision, and those of other cities, is designed to exclude low and moderate income housing entirely. Whether provisions so designed would be unreasonable and unlawful would depend upon the facts in each individual case. See *Belle Terre v. Boraas* (1974), 416 U.S. 1. The record herein justifies no finding, one way or the other, in this regard.



STERN, *J.*, concurring. In the instant case, the majority ably points out the basic legal deficiencies of the Eastlake charter provision. The broader issues raised by this action also, I believe, require comment.

Almost half a century ago, in the landmark case of *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, the United States Supreme Court affirmed the validity of a community zoning ordinance which restricted the use of private land, and the court recognized that such restrictions were necessary to the welfare of complex urban Communities. As Mr. Justice Sutherland stated: "* * * Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive." 272 U.S., at 387. In that case, the village of Euclid, by its zoning ordinance, restricted industrial development to nonresidential areas, and the court approved, stating: "If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. *It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.*" (Emphasis added.) 272 U.S., at 389, 390.

Present-day conditions raise new issues also requiring the weighing of the general public interest against the interest of a municipality.

There can be little doubt of the true purpose of Eastlake's charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. The charter provision was apparently adopted specifically, to prevent multi-family housing, and indeed was adopted while Forest City's application for rezoning to permit a multi-family housing project was pending before the City Planning Commission and City Council. The restrictive purpose of the provision is crudely apparent on its face. Any zoning change, regardless of how minor, and regardless of its approval by the Planning Commission and the City Council, must be approved by a city-wide referendum. The proposed change must receive, rather than a simple majority, at least a 55 percent affirmative vote. Finally, the owner of the property affected is required to pay the cost of the election, although the provision gives no hint as to exactly which costs would be billed to a property owner.

There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.

Even stripped of its harsher provisions the charter provision poses serious problems. A mandatory, city-wide referendum which applies to any zoning change must, of necessity, submit decisions that affect one person's use of his property to thousands of voters with no interest whatever in that property. We need only imagine the adoption of this same provision in a city such as Cleveland. By such a provision, rezoning for a corner gasoline station would require the approval of hundreds of thousands of voters, most of them living miles away, and few of them with the slightest interest in the matter. This would be government by caprice, and would seriously dilute the right of private ownership of property. The law recog-



nizes that the use a person makes of his property must inevitably affect his neighbors and, in some cases, the surrounding community. These real interests are entitled to be balanced against the rights of a property owner; but a law which requires a property owner, who proposes a wholly benign use of his property, to obtain the assent of thousands of persons with no such interest, goes beyond any reasonable public purpose.

Zoning provisions such as that in Eastlake's charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas. The struggles of our suburbs to build such walls can be seen in cases throughout the county. See, Note, Removing the Bar to Exclusionary Zoning to a Decent Home, 32 Ohio St. L. J. 373; *Concord Township Appeal* (1970), 439 Pa. 466, 268 A.2d 765. Cf. *Matter of Golden v. Planning Bd. of Ramapo* (1972), 30 N.Y.2d 359, 285 N.E.2d 291. In the suburbs surrounding the city of Cleveland, the requirement of mandatory referendums for approval of zoning changes has been adopted by over a dozen communities; some of these communities have provisions which specifically apply to any zoning change to permit multi-family or low-income housing. The inevitable effect of such provisions is to perpetuate the de facto divisions in our society between black and white, rich and poor. As one commission report has pointed out: "The people of the slums are the symptoms of the urban problem, not the cause. They are virtually imprisoned in slums by the white suburban noose around the inner city, a noose that says 'Negroes and poor people not wanted.'" National Commission on Urban Problems, Building the American City, 1 (1968). The exercise of the police power through zoning cannot be permitted where its sole purpose is to tighten that noose.

Zoning, and other forms of urban planning, are even more fundamental and necessary today than they were nearly fifty years ago when *Euclid v. Ambler Realty Co.* was decided, for our cities are far more populous and our problems far more complex. Certainly there is no simple solution to the problem of planning a community's development so that it be healthy, well-balanced, and just. "* * * [Z]oning is a complex and important function of the state. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Belle Terre v. Boraas* (1974), 416 U.S. 1, 13 (Marshall, J., dissenting).

The importance of zoning makes imperative the prevention of its abuse or of its application to systematically perpetuate inequity.

I can perceive no proper public purpose which would justify the burdensome nature of the Eastlake charter provision, or would suggest that it represents planning for the community's needs rather than simple resistance to change and exclusion of persons of low and middle income. Accordingly, I agree with the majority that the charter provision involved herein is invalid, and concur in the opinion and judgment.

O'NEILL, C. J., HERBERT and W. BROWN, JJ., concur in the foregoing concurring opinion.

CORRIGAN, J., dissenting. This appeal brings into question the validity of the provision of Section 3, Article VIII of the Charter of the city of Eastlake, which provides that zoning ordinances shall not be effective until "approved by a 55% favorable vote of all votes cast of the qualified electors * * * at the next regular municipal election."



It is appellant's position that this charter provision "is invalid as contrary to the Constitutions of the United States and the state of Ohio because it deprives a property owner of his property without due process of law" and that it "is invalid as contrary to the referendum provisions of the Ohio Constitution."

Appellant argues that due process of law entitles it "to have its use of its real property controlled by a responsible legislative organ of government, and not to the uncontrolled whim of a *minority* of its neighbors." *Eubank v. Richmond* (1912), 226 U.S. 137, is cited by appellant. In that case, the city ordinance provided for the establishment of building lines by the committee on streets upon written request by the owners of two-thirds of the property abutting a street. The court found the ordinance to be "an unreasonable exercise of the police power," stating, at pages 143-144: "The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. * * *"

Appellant notes that *Eubank* was distinguished in *Thomas Cusack Co. v. Chicago* (1917), 242 U.S. 526. There, an ordinance permitted erection of billboards upon the consent of the owners of a majority of the frontage of the property on both sides of the street in the block where the billboard was to be erected. It was argued that this constituted "* * * a delegation of legislative power to the owners of a majority of the frontage of the property in the block 'to subject the use to be made of their property by the minority owners of property in such block to the whims and caprices of their neighbors.' "

In upholding the validity of the ordinance, the court said, at page 531:

> "The plaintiff in error relies chiefly upon *Eubank v. Richmond*, 226 U.S. 137. A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances."

*Cusack* was commented upon in *Valkanet v. Chicago* (1958), 13 Ill. 2d 268, 272, 148 N.E.2d 767, wherein the court said:

> "While the *Cusack* decision has been criticized (University of Illinois 1954 Law Forum, 309, 311-312), it has been generally followed. And, even though it is impossible to lay down a hard-and-fast rule, we conclude that if an ordinance permits a certain percentage of the property owners to impose or create a restriction upon their neighbors' property by the devise of consent provisions, such limitation constitutes an invalid delegation of legislative power, but if the consent provision merely waives or modifies a lawful



> and reasonable legislative restriction or prohibition, it is within constitutional limitations. * * *"

On the issue raised in the above-cited cases, this court, in paragraph three of the syllabus of *State, ex rel. Standard Oil Co. v. Combs* (1935), 129 Ohio St. 251, held:

> "An ordinance requiring written consents of fifty-one per cent of the property owners in a residential district within a radius of six hundred feet from a filling station, as a prerequisite to its installation, is not a delegation of legislative power conferred by council upon such property owners; and such consent provisions are not repugnant to our state or federal constitutions. (*Cincinnati, W. & Z. Rd. Co. v. Commrs. of Clinton County*, 1 Ohio St. 77, approved and followed; *City of Canton v. Mid-Continent Producers & Refiners Corp.*, 115 Ohio St. 705, overruled.)"

The foregoing decisions are distinguishable from the instant case. Here, we are concerned with a referendum on a zoning ordinance which is submitted to the electorate of the municipality.

Facts similar to those appearing in this cause were before the court in *Southern Alameda Spanish Speaking Organization v. Union City* (C. A. 9, 1970), 424 F.2d 291. There, a city-wide referendum nullifying a zoning ordinance rezoning certain land was upheld. As to a contention that the "referendum zoning" violated due-process requirements, the court said, at page 294:

> "Appellants initially challenge the constitutionality of California's referendum procedures as applied to the zoning process. They contend that 'referendum zoning' violates due process requirements.
>
> "The rights asserted are those of a landowner (SASSO) to be free from arbitrary restrictions on

land use. Appellants assert that regulation of land use by zoning is constitutionally permissible only where procedural safeguards assure that the resulting limitations have been determined, by legislatively promulgated standards, to be in the interest of public health, safety, morals, or the general welfare. They contend that the referendum process destroys the necessary procedural safeguards upon which a municipality's power to zone is based and subjects zoning decisions to the bias, caprice and self-interest of the voter. They rely on *Washington, ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928), and *Eubank v. City of Richmond,* 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912).

"Appellants' reliance on these cases is misplaced. There, local ordinances permitted residents of a neighborhood, by majority vote (*Eubank*) or by withholding consent (*Washington*), to impose restrictions that otherwise had not legislatively been determined to be in the public interest. The resulting rule, as applied to appellants' contentions respecting procedural safeguards, would seem to be that an expression of neighborhood preference for restraints, uncontrolled by any legislative responsibility to apply acceptable public interest standards, is not such a determination of what is in the public interest as will justify an exercise of the police power to zone.

"A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest. See *Spaulding v. Blair,* 403 F.2d 862



(4th Cir. 1968). This question lay at the heart of the proposition put to the voters. That some voters individually may have failed to meet their responsibilities as legislators to vote wisely and unselfishly cannot alter the result.

"Nor can it be said that the resulting legislation on its face was so unrelated to acceptable public interest standards as to constitute an arbitary or unreasonable exercise of the police power. See *Washington, ex rel. Seattle Title Trust Co. v. Roberge, supra; Eubank v. Richmond, supra; Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926). Many environmental and social values are involved in a determination of how land would best be used in the public interest. The choice of the voters of Union City is not lacking in support in this regard.

> "Thus in the present case neither the zoning process itself nor the result can be said to be such an arbitrary or unreasonable exercise of the zoning power as to be violative of appellants' right to due process of law. * * *"

In my opinion, the foregoing reasoning is persuasive and I would hold that the submission of a zoning ordinance to the electorate of a municipality is not violative of due process.

Examination of the statutes reveals that submission of zoning resolutions to electors by referendum is not an innovative concept. R. C. 303.11 provides for submission of zoning resolutions adopted by a board of county commissioners to the "electors residing in the unincorporated area of the county included in the proposed plan of zoning for their approval or rejection. * * *"

R. C. 519.11 provides for submission of zoning resolutions adopted by a board of township trustees "to the electors residing in the unincorporated area of the township included in the proposed plan of zoning for their approval or rejection * * *."

In each statute the zoning regulations become effective only if a majority of the vote cast on this issue is in favor of the proposed plan.

R. C. 303.12 and 519.12 provide for referendum votes on amendments or supplements to county or township zoning resolutions respectively.

R. C. 519.12 was brought into question in *Cook-Johnson Realty Co. v. Bertolini* (1968), 15 Ohio St. 2d 195. As to the constitutionality of that section, it was said, at pages 200-201:

> "What the General Assembly has done in Section 519.12, Revised Code, is to provide the people of the several townships with a power to veto, by use of the device of referendum, zoning resolutions passed by township trustees.
>
> "We find no constitutional impediment to a grant of legislative power by the General Assembly to township trustees to make zoning resolutions, nor for the General Assembly to reserve the power of referendum to the people who will be affected by such resolutions. Therefore, Section 519.12, Revised Code, insofar as it accomplishes these purposes of the General Assembly, is constitutional."

In *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St. 2d 147, this court noted, at page 150:

> "In providing for referendum, however, a municipal charter is not restricted to the adoption of the same provisions enacted by the General Assembly. It may be less restrictive as to use of the referendum, as was the Charter of the city of Toledo which authorized referendum on all ordinances, including one levying a tax passed as an emergency measure. *State ex rel. Snyder v. Bd. of Elections* (1946), 78 Ohio App. 194. It may be more restrictive, as in *Dillon v. Cleveland, supra* (117 Ohio St. 258), where a referendum would have been required under state law, but was not required under the provisions of the Charter of the city of Cleveland."



When the above-stated principles from *Cook-Johnson Realty Co.* and *Bramblette, supra,* are applied to the instant cause, it is clear that the referendum provisions of the city charter in question are not "invalid as contrary to the referendum provisions of the Ohio Constitution."

The fact that the charter section in question requires "a 55% favorable vote of all votes cast" does not, in my opinion, stand as an impediment to the constitutional validity of the referendum procedure established by the charter. Similar restrictive election requirements can be found in the statutes, *e. g.*, R. C. 139.02 (for issuance of federal aid bonds); R. C. 133.16 (for issuance of bonds for reconstruction of bridges); R. C. 1515.04 (creation of soil and water conservation district); and R. C. 5705.191 (approval of excess tax levy).

To particularize, I would hold in this case that the mandatory referendum provision of Section 3, Article VIII of the Eastlake charter, does not constitute an unlawful delegation of legislative power and does not deny to the appellant its constitutional right to due process of law. Accordingly, I would affirm the judgment of the Court of Appeals.

CELEBREZZE, J., concurs in the foregoing dissenting opinion.

## APPENDIX A (Continued)

### Orders of the Supreme Court of Ohio

No. 73-901

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

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FOREST CITY ENTERPRISES, INC.,
*Appellant,*

vs.

CITY OF EASTLAKE, *et al.*,
*Appellees.*

---

APPEAL FROM THE COURT OF APPEALS
FOR LAKE COUNTY

(Entered March 19, 1975)

This cause, here on appeal from the Court of Appeals for Lake County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals affirming the validity of the mandatory referendum and 55 percent approval provisions of the Eastlake charter, is reversed, for the reasons set forth in the opinion rendered herein.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.

• • • • •



(Caption as above)

REHEARING

(Entered April 17, 1975)

It is ordered by the court that rehearing in this case is denied.

## APPENDIX B

### Opinions of the Court of Appeals

(Dated July 23, 1973)

No. 263

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT OF OHIO,
LAKE COUNTY

---

FOREST CITY ENTERPRISES, INC.,
*Plaintiff-Appellant,*

vs.

THE CITY OF EASTLAKE, *et al.*,
*Defendants-Appellees.*

---

OPINION OF THE COURT OF APPEALS
AS TO THE APPEAL

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties. Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each assignment of error was reviewed and upon review the following disposition was made:

This is an appeal from a judgment of the Common Pleas Court.

The facts are not in dispute. Plaintiff-appellant owns certain property in the City of Eastlake. Prior to May 18, 1971 it was zoned for limited industrial use. On May 18, 1971 appellant filed an application for a change in the zoning to multi-family high rise use. The application was processed by the City Planning Commission and City Council and finally the change in zoning classification was approved by Council in Ordinance 1971-168.

Article VIII, Section 3 of the Charter of the City of Eastlake provides that no ordinance dealing with zoning, land use or development shall take effect until after a mandatory referendum election is held at which the ordinance receives a 55% affirmative vote, the cost of the election being borne by the owner of the real property affected.

The sole question before this court is whether Article VIII Section 3 of the Charter of the City of Eastlake is constitutional.

The answer is yes.

Article II Section 1f of the Ohio Constitution states:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; *such powers shall be exercised in the manner now or hereafter provided by law.*" (Italics ours)

RC 731.29 reads as follows in pertinent part:

> "Any ordinance or other measure passed by the legislative authority of a municipal corporation shall



> be subject to the referendum except as provided by section 731.30 of the Revised Code. No ordinance or other measure shall go into effect until thirty days after it is filed with the mayor of a city or passed by the legislative authority in a village, except as provided by such section.
>
> "When a petition, signed by ten per cent of the number of electors who voted for governor at the next preceding general election for the office of governor in the municipal corporation, is filed with the city auditor or village clerk within thirty days after any ordinance or other measure is filed with the mayor or passed by the legislative authority of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such auditor or clerk shall, after ten days, and not later than four p.m. of the ninetieth day before the day of the election, certify the petition to the board of elections. . . ."

Article VIII Section 3 of the Eastlake Charter states in pertinent part as to zoning amendments:

> ". . . . . That in the event the city council should approve any of the preceding changes, or enactments, whether approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election. . . . . ."

A cursory reading of RC 731.29 and Article VIII Section 3 of the Charter of Eastlake clearly reveals that RC 731.29 requires a petition signed by ten per cent of the num-

ber of electors who voted for governor at the next preceding election for the office of governor in the municipal corporation as a prerequisite to submitting a referendum on a municipal ordinance to the voters of the municipality whereas Article VIII Section 3 of the Eastlake Charter requires no petitions signed by electors of the City of Eastlake as a prerequisite to a referendum on a zoning change ordinance, in fact requires a mandatory referendum on every zoning change ordinance approved by council.

RC 731.41 states:

> "Sections 731.28-731.41, inclusive, of the Revised Code do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures."

The Supreme Court of Ohio held in *State ex rel. Bramblette v. Yordy*, 24 OS 2d 147 on page 150:

> "In providing for referendum, however, a municipal charter is not restricted to the addition of the same provisions enacted by the General Assembly. It may be less restrictive as to use of the referendum, as was the Charter of the City of Toledo which authorized referendum, on all ordinances, including one levying a tax passed as an emergency measure, State ex rel. Snyder vs. Bd. of Elections (1946), 78 O App 194. It may be more restrictive, as in Dillon v. Cleveland, supra 117 Ohio St. 258, where a referendum would have been required under said law, but was not required under the provisions of the Charter of the City of Cleveland."

Therefore, we are of the opinion that that portion of Article 2 Section 1f of the Ohio Constitution which says



that "such powers shall be exercised in the manner now or hereafter provided by law" refers to the provisions of a municipality's charter if said charter has provisions for initiative and referendum relative to its own ordinances or, where there are no charter provisions, the exercise of such power is only provided for by the General Assembly.

In the instant case, the charter of the City of Eastlake provides for a referendum on all ordinances containing zoning changes, a provision which is "less restrictive as to the use of the referendum", but which is a permitted provision of the charter "law" under the "home rule" provisions of the Constitution.

In our opinion, Article VIII Section 3 of the Eastlake Charter is not in conflict with Article 2 Section 1f of the Ohio Constitution. In fact, Article VIII Section 3 of the Eastlake Charter is permitted under Article XVIII Section 3 in the Ohio Constitution.

Judgment affirmed.

ROBERT E. COOK
*Judge*

JONES, *P.J.*

HOFSTETTER, *J.*, concur.

## OPINION OF THE COURT OF APPEALS AS TO THE CROSS APPEAL

(Dated August 27, 1973)

COOK, *J.*

Coming now to the cross appeal of the appellees, City of Eastlake, et al., which states that "the portion of the

judgment of the Court of Common Pleas, which found unconstitutional the provision of the Eastlake Charter Amendment requiring assessment of the costs of election to the effected [sic] property owner is contrary to law".

In our opinion, the trial court should be affirmed as to its conclusion that the portion of the Eastlake charter that assesses the cost of referendum on a proposed zoning change to the applicant is unconstitutional.

In State, ex rel., Ayres, 142 OS 216, the Supreme Court of Ohio held:

> "Under the mandatory provisions of Section 2, Article X and Section 1, Article XVII of the Constitution of Ohio, and the statutes passed pursuant thereto, all matters pertaining to the conduct of election are state functions."

Pursuant to said constitutional provision the legislature of the State of Ohio enacted RC 3501.17 in which it provided that the costs of special elections held either on the regular primary or general election days or on a day other than the day of a primary or general election should be charged to the political subdivision involved.

Therefore, any provision in a charter of a municipality attempting to assess the cost of an election for a referendum on a proposed zoning change to the applicant is in violation of the Ohio Constitution and RC 3501.17.

Judgement on cross appeal is affirmed.

JUDGE ROBERT E. COOK

JONES, *P.J.*

HOFSTETTER, *J.*, concur



## APPENDIX C

### Opinion of the Court of Common Pleas

(Dated October 27, 1972)

No. 72 Civ. 0219

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, LAKE COUNTY, SS.

---

FOREST CITY ENTERPRISES, INC.,
*Plaintiff,*

vs.

THE CITY OF EASTLAKE *et al.*,
*Defendants.*

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OPINION

Plaintiff is the owner of real property located in the City of Eastlake and sought to have the property rezoned from limited industrial to multi-family high rise.

An application for such rezoning was filed on May 18, 1971 and on December 28, 1971 Council of the City of Eastlake enacted an Ordinance providing the necessary zoning change.

However, on November 2, 1971 the voters of the City of Eastlake adopted Art. VIII, Section 3 of their Charter which provided that any Ordinance changing any zoning or land use in the City must be submitted to the voter and receive a 55% affirmative vote.

The Ordinance in question did not receive the necessary votes and brings this action challenging the constitutionality of the Charter Amendment.

The first challenge is that the provision of the Charter may not be applied to property such as the plaintiff's as their application was pending when the Amendment to the Charter was adopted.

Plaintiff cites a number of cases where zoning was changed after application was made for a permit, such is not the case here. The zoning has not been changed and the effect of the Charter Amendment is to change the methods to obtain a change.

The next challenge is that the Amendment offends both the Federal and State Constitution as follows:

1. It constitutes an improper abdication of the legislative duties of Council, citing, *James v. Valtierra,* 402 U.S. 137. This Court is of the opinion that this case tends to establish the right of the City to adopt such a Charter Amendment. There is no question that the adoption of zoning requirement is a legislative act. But that is not what this Amendment does. What it does do, is preserve to the electors of Eastlake, the right to review the legislation adopted by their Planning Commission and their Council.

The next challenge is that the Amendment is violate [sic] of the due process clause.

A) The need to refer for a referendum without standard or criteria. The Court has already pointed out that the Council retains the standards and make the change, the people merely adopt or reject the Ordinance as submitted, they do not create the legislation.

The next challenge is the 55% requirement of the Amendment but cites no authority for this claim.

The next claim is the assessment of the costs of the election to the property owner. The Court is of the opinion that such provision is unconstitutional.



It is true that the Amendment refers to the applicant but suppose the change proposed to be made is originated by the Planning Commission who then is the applicant, or if the change proposed affects others than the applicant. This would not, however invalidate the balance of Amendment.

The defendant further argues that by reason of the Amendment it would be subject to arbitrary and unreasonable action. No such evidence was presented to this Court, if such facts do in fact exist, the Court would still be available to grant relief in such cases.

Lastly, the plaintiff charges that the Amendment offends the referendum provisions of the Ohio Constitution. No citation or other authority is offered in support of this contention.

A somewhat similar mandatory referendum requirement was approved by the U. S. Supreme Court in *Shaffer v. Veltierra,* 402 U.S. 137, see also, *Hunter v. Erickson,* 393 U.S. 385.

The Court makes no comment on the wisdom of what appears to be a cumbersome method of changing zoning to meet changing times.

The Court is of the opinion that the presumption of the validity of Amendment must prevail and declares the amendment to be constitutional except as to the assessment of costs of the election.

Prevailing counsel will prepare a judgment entry in accordance with this opinion and the Rules of this Court.

JOHN F. CLAIR, JR.
*Judge of the Court of Common Pleas*

# APPENDIX D

## Charter of the City of Eastlake

### ARTICLE I

#### Preamble

We, the people of the City of Eastlake, in the County of Lake, and State of Ohio, within the boundaries, as now established in the manner provided by the laws of the State of Ohio, and as incorporated in this charter do hereby adopt this Charter for the government of the City of Eastlake in order to secure the benefits of municipal home rule and to exercise all the powers of local self-government under the Constitution and the Laws of the State of Ohio.

• • • • •

Section 2. Powers

The municipality shall have all the powers of local self-government now or hereafter granted to municipalities by the Constitution of the State of Ohio, and such further powers as are now or hereafter granted by the Laws of the State of Ohio; and all such powers shall be exercised in the manner prescribed by this Charter, or, to the extent that the manner is not prescribed herein, in such manner as the Council may prescribe by ordinance. The powers of the municipality may also be exercised, except as a contrary intent appears in this Charter or in the enactments of the Council conformably hereto, in such manner as may now or hereafter be provided by the general laws of Ohio. Enumeration of, or reference to particular powers by this Charter shall not be construed to be exclusive.

• • • • •



### ARTICLE III

#### Initiative, Referendum and Recall

Section 1. Initiative, Referendum

Ordinances and other measures may be proposed by initiative petition and adopted by elections, and ordinances and other measures adopted by the Council shall be subject to referendum, to the extent and in the manner now or hereafter provided by this Charter or the Laws of Ohio.

• • • • •

### ARTICLE V

#### The Council

Section 1. Powers, Number and Terms

All the legislative powers of the City of Eastlake, except as limited by this Charter and the Constitution of Ohio, shall be vested in a Council of seven (7) members of whom three (3) members shall be elected at large and four (4) members of which shall be elected from wards, one from each ward.

Members of Council shall serve for a term of four (4) years, beginning on the first day of January next following their election and unitl their successors are elected and qualified except that the three members at large elected at the Regular Municipal election in 1955 shall serve for two (2) years and thereafter all councilmen at large shall be elected for a four (4) year term.

• • • • •

## ARTICLE VIII

### City Planning Commission

### Section 3. Mandatory Referral

That any change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land and the selling or leasing or rental of parkways, playgrounds, or other city lands or real property, or for the widening, narrowing, re-locating, vacating, or changing the use of any public street, avenue, boulevard, or alley cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the city council should approve any of the preceding changes, or enactments, whether or approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. Said issue shall be submitted to the electors of the City only after approval of a change of an existing land use by the Council for an applicant, and the applicant agrees to assume all costs of the election and post bond with the city Auditor in an amount estimated by the County Auditor or the Board of Elections proportionate with any other issues that may be on the ballot at the same time. The applicant shall further agree to authorize the City Auditor to advertise, and assume the obligations to pay, for a notice of the posted



bond and the requested land use change in a newspaper of general circulations, whose circulation is either the largest, or second to the largest within the limits of the City for two consecutive times, with at least two weeks between notices and a third notice one week prior to the election. Should the land use request not be affirmed by a 55% favorable vote it cannot be presented again for one full year and a new request must be made at that time.

It shall be the duty of any applicant for a land use change to obtain zoning codes, maps, thoroughfare and sewer plans or advice of the city council and officials and approving bodies for interpretation of this section as they are always available. If this section is violated and a building is under construction or completely constructed it shall be mandatory for the Mayor, Safety Director, Service Director and Building Inspector equally to have the building or structure removed completely within 60 days at the owners expense as these officials are charged with the enforcement of this section. It shall be mandatory that the City Council charge and fund the Planning Commission to have on display at all times in the council chambers and available to the public a zone map, showing a legend and summary of zoning regulations by district, Major use, Minimum and maximum lot width and that each district, city park, playground, and city lands be accurately located and identified with the date of adoption and the date of revisions to date. Any and all revisions will be posted to the zone map within 90 days of their occurrence. Maps shall be available to each land owner of the city for a nominal cost not to exceed $2.50 each on demand. Maps shall be available within six months of this charter change.

Approved: November 2, 1971

General Election

Supreme Court, U. S.
FILED
JUL 21 1975
MICHAEL RODAK, JR., CLERK

NO. 74 – 1563

# Supreme Court of the United States

October Term, 1974

THE CITY OF EASTLAKE, et al.,
*Petitioners,*
*vs.*
FOREST CITY ENTERPRISES, INC.,
*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO*

## BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

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No. 74-1563

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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THE CITY OF EASTLAKE, et al., Petitioners

vs.

FOREST CITY ENTERPRISES, INC., Respondent

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On Petition for a Writ of Certiorari
To the Supreme Court of Ohio

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# BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

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## INTEREST OF AMICUS CURIAE

This amicus curiae brief is being filed pursuant to Rule 42-4 of the Rules of the Supreme Court of the United States, by the City of Parma, Ohio, a political subdivision of the State of Ohio, and is sponsored by its City Solicitor, the authorized law officer thereof.

Parma is vitally interested in the outcome of this litigation because it is one of the numerous communities in northeastern Ohio whose residents have initiated and adopted a referendum requirement similar to Eastlake's charter provision. Specifically, Parma has an additional vital interest because it has been sued by a builder who purchased property zoned for single-family residences and wants the

property rezoned for an office building without being subject to the referendum requirement.

Although in a sense city officials might feel the referendum requirement represents a lack of trust in the judgment of elected municipal officials, Parma officials regard the referendum requirement in a more positive light -- in that it represents the expressed desire of Americans to engage in participatory democracy. It represents a tangible expression of what would otherwise be bicentennial rhetoric about "government of, by, and for the people". Thus, it is particularly appropriate that this case is presented to the Court at this particular time in history. It will enable this high tribunal to reaffirm the concept that government in America is really of, by, and for the people who desire to participate in the making and unmaking of the laws affecting the very quality of their lives.

## ARGUMENT

### The Decision of the Ohio Supreme Court Denies the Cherished Right to Vote

As this Court unanimously held in Louisiana v. United States, 380 U.S. 145, 153 (1965), it is the "cherished right of people in a country like ours to vote". The right to vote is of the essence of a democratic society and that right is fundamental because it is preservative of all rights. Harman v. Forssenius, 380 U.S. 528, 537 (1965). Other rights, even the most basic, are illusory if the right to vote is undermined. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).



Undeniably, the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. A consistent line of decisions by the Supreme Court in cases involving the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally-protected right to vote, and history has seen a continuing expansion of the scope of the right of suffrage in this country. Reynolds v. Sims, 377 U.S. 533, 554-555 (1964).

This Court's concern with protecting the cherished right to vote is a recognition that use of the ballot box is ultimately the only manner in which the power of the people (which is, as Alexander Hamilton noted in No. 78 of The Federalist Papers, superior to both legislative and judicial powers of government) can be effective. The father of American democracy, Thomas Jefferson, trusted the good sense and capability of the people to govern themselves, and believed that "the will of the people is the only legitimate foundation of any government". "Every government degenerates when trusted to the rules alone. The people themselves are its only safe depositories." "I know of no safe depository of the ultimate powers of the society but the people themselves." "No government can continue good, but under the control of the people." •

It is obvious from reading the majority and concurring opinions of the Supreme Court of Ohio that the court's majority miscon-

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• Jefferson on Democracy, ed. by Saul K. Padover, passim.

ceived the role of the people in the democratic process and lacked faith in the people's ability to make responsible decisions in matters of vital concern to them. They foreclosed the people's right to vote on zoning matters because of fear and distrust of the way they may vote.

But, in Carrington v. Rash, 380 U.S. 89, 94 (1965) this Court held that:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "(T)he exercise of rights so vital to the maintenance of democratic institutions," Schneider v. State, 308 U.S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.

If it is constitutionally impermissible to deny the vote to a sector of the population because of the way they may vote, the entire community should not be disenfranchised because five judges question the voters' sense of responsibility or motives. Neither the due process clause of the Fourteenth Amendment nor any other provision of the Constitution justifies denial of the cherished right to vote on such a negative perception of participatory democracy.

"Democracy is a very simple principle, and those who speculate about its meaning are those who are not quite willing to accept it.



The dictionary defines it as 'the rule of the people'. Not much more need be said about it." •

Moreover, the gratuitous allusion to a discriminatory purpose injected by the concurring opinion below finds no support in the record, and verges on judicial irresponsibility. The court-imposed disenfranchisement would occur if the zoning matter involved an office building (as in Parma's litigation), or a factory, or a junk yard, or any other "spot zoning" request, as well as one involving housing.

## REFERENDUMS ARE PEOPLE LEGISLATING

Article I, § 2 of the Constitution of the State of Ohio declares that "All political power is inherent in the people", and Article II, § 1 f provides that "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action..."

It is therefore hardly an unlawful delegation of legislative power when the people of a municipality exercise their constitutional right to vote in a referendum election, and the dissenting opinion by Judge Corrigan below effectively countered the majority

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• Introduction to Bernard Smith, The Democratic Spirit at XXV-XXVI (New York: Alfred A. Knopf, 1941).

opinion's assertions on that point (Petition, pages 30-37).

As the Supreme Court of California held in banc in Johnston v. City of Claremont, 49 Cal. 2d 826, 837 (1958):

> The right of referendum with respect to zoning ordinances is essential for the rights of the electors of each city. A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance.

As urbanization increases, institutions of local government, which have always been a major aspect of our system, and their responsible and responsive operation "is today of increasing importance to the quality of life of more and more of our citizens". Avery v. Midland County, Texas, 390 U.S. 474, 481 (1968).

Judicial decisions dealing with the cherished right to vote, in referendums, of people in urban areas are of vital national importance as more and more of the American people live in such areas. Denial of such right ostensibly on a federal constitutional ground should be suspect and carefully scrutinized.

As did the Arizona Supreme Court in Queen Creek Land & Cattle Corporation v. The Yavapai County Board of Supervisors, 108 Ariz. 449, 451 (1972), the Ohio Supreme Court should have affirmed the lower-court decisions upholding the right to a referendum on proposed zoning changes, for the power of



the people to legislate is as great as the power of the Legislature to legislate, and "The people, in exercising the rights of initiative and referendum, must enjoy the same immunity from judicial interference as do the Legislature and the inferior law-making bodies."

## CONCLUSION

There are special and important reasons for granting the petition for a writ of certiorari in this case. The cherished right to vote is among the most important and preferred rights guaranteed by the Constitution. Any interference with the right to vote should be suspect. The precise question decided by the Supreme Court of Ohio has not been decided by this Court. The Ohio decision was ostensibly based on the Fourteenth Amendment, and the Supreme Court of Ohio misconstrued the cases it relied on, which were decided by this Court from four to six decades ago. Its decision is not in accord with the teaching of recent applicable decisions of this Court stressing the preferred status of the constitutionally-protected right to vote in state and local elections. The issues involved have significance beyond the confines of the State of Ohio, since the people of this nation are now predominantly urban dwellers. A denial of the right to vote on zoning issues affecting the very quality of the lives of Ohio residents, if used as a precedent by courts in other states, would have serious and far-reaching ill effects throughout this constitutional democratic republic. Even in this 200th year of our independence, there are some in public office who do not trust the people to make the

public decisions which affect the quality of their lives.

It is therefore respectfully submitted that for the reasons stated in this brief and those stated in the petition for a writ of certiorari, the petition should be granted, and the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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(216) 886-2323
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Amicus Curiae
City of Parma, Ohio

Sponsored by:

ANDREW BOYKO
Solicitor, City of Parma, Ohio
Authorized Law Officer

Supreme Court, U. S.
FILED
NOV 20 1975
MICHAEL RODAK, JR., CLERK

**APPENDIX**

# Supreme Court of the United States

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**October Term, 1974**

**No. 74-1563**

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THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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**Petition for Certiorari Filed June 12, 1975**
**Certiorari Granted October 14, 1975**

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No. 72 Civ 0219

# In the Court of Common Pleas

LAKE COUNTY, OHIO

---

FOREST CITY ENTERPRISES, INC.,
*Plaintiff,*

vs.

THE CITY OF EASTLAKE, *et al.*,
*Defendants.*

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## RELEVANT DOCKET ENTRIES

| | |
|---|---|
| 4/14/72 | Complaint, Exhibit, and Notice of Hearing filed. |
| 4/14/72 | Summons issued by Certified Mail RRR#550203 to the City of Eastlake, RRR#550204 to The City Planning Commission of the City of Eastlake, and RRR#550205 to the Board of Elections of Lake County. |
| 5/4/72 | Answer of Defendant, The City of Eastlake and The City Planning Commission of the City of Eastlake, Affidavit of Service filed. |
| 5/16/72 | Journal Entry filed: Defendant, Board of Elections of Lake County leave to move or plead by June 15, 1972. |
| 6/9/72 | Journal Entry filed: Leave to plead by July 14, 1972. |
| 8/31/72 | Plaintiffs trial memorandum. Exhibits filed. |
| 8/31/72 | Certificate for court stenographers fee filed. |
| 9/27/72 | Journal Entry filed: Defendant, City of Eastlake leave to file answer brief by October 15, 1972. |

10/16/72 Defendants, Answer trial memorandum, Affidavit of Service filed.

10/27/72 Journal Entry filed: Opinion.

11/9/72 Journal Entry filed: Plaintiff complaint dismissed at plaintiff's costs.

12/8/72 Notice of Appeal filed.

12/8/72 Notices issued to Andrews & Illenberger, Fred V. Skok, and Deidre Becker, Court of Appeals, and Clerk of Court of Appeals.

12/19/72 Notice of Cross Appeal, filed.

12/19/72 Notices issued to Timothy F. McMahon and Michael M. Hughes, Fred V. Skok, Deidre Becker and Clerk of Court of Appeals.

1/3/73 Plaintiffs Transcript of Record filed.

1/17/73 Transcript of Journal Entries and Docket issued to Court of Appeals.

5/9/75 Mandates received from Ohio Supreme Court (Reversed & Remanded) Court of Appeals (Affirmed) and original papers received from Court of Appeals, filed.

**In the Court of Appeals for the Eleventh Appellate District of Ohio**

12/8/72 Notice of Appeal, filed.

1/11/73 Papers transferred from Case #4-264

1/17/73 Record, filed.

2/6/73 Motion of Plaintiff-Appellant for Enlargement of time for filing Brief and Assignment of Error, filed.



2/27/73 Journal Entry filed: Upon Motion, leave granted appellant to file Brief and Assignment of Errors by March 8, 1973. See Journal Entry.

3/8/73 Assignment of Error and Brief of Appellant, filed.

3/30/73 Motion to Enlarge Period to file Answer Brief, filed.

4/6/73 Journal Entry filed: Upon Motion, leave granted appellee to file Answer Brief by April 28, 1973. See Journal Entry.

4/27/73 Assignment of Error on Cross Appeal and Brief of Appellees, filed.

7/23/73 Judgment affirmed. See Announcement of Decision. See Journal Entry to be prepared.

7/23/73 Announcement of Decision, filed.

8/28/73 Judgment affirmed on Cross-Appeal. See Opinion. See Journal Entry to be prepared.

8/28/73 Opinion filed.

9/11/73 Journal Entry filed. Judgment of Trial Court is affirmed as to appeal by appellant and the Cross Appeal of appellee. Appellants costs. Exceptions.

10/10/73 Notice of Appeal to Ohio Supreme Court, Certificate of Service, filed.

1/28/74 Copy of entry granting Motion for Lake County to certify its record received from Ohio Supreme Court, filed.

1/28/74 Transcript of Docket and Journal Entries issued to Ohio Supreme Court.

1/31/74 Certified Receipt #759399 returned and filed.

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| 4/18/75 | Entry received from Ohio Supreme Court reversing Court of Appeals decision, filed. |
| 4/18/75 | Mandate from Ohio Supreme Court filed: Judgment of the Court of Appeals affirming the validity of the mandatory referendum and 55 percent approval provisions of the Eastlake Charter, is reversed, for the reasons set forth in the Opinion rendered herein. Appellees costs. |
| 4/18/75 | Rehearing Order received from Ohio Supreme Court: It is ordered by the Court that rehearing in this case is denied. |
| 5/8/75 | Original file received from Ohio Supreme Court. |
| 5/9/75 | Mandate and original papers issued to Common Pleas Court. |
| 7/14/75 | Entry received from Ohio Supreme Court ordering stay of execution of Judgment for a period of 20 days for counsel for appellee to apply to the Supreme Court of the United States for an indefinite stay. If an indefinite stay is not issued within this 20 day period, this stay will automatically terminate and no further order will issue from Ohio Supreme Court, filed. |

**In the Supreme Court of Ohio**

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| November 9, 1973 | Notice of Appeal and Certificate of Service filed. |
| November 9, 1973 | Memorandum of Appellant and Certificate of Service filed. |
| December 10, 1973 | Memorandum of Appellee and Certificate of Service filed. |



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| January 25, 1974 | Motion to Certify Record Allowed. J. 52-363 |
| January 25, 1974 | Order to Certify Record sent Clerk of Courts. |
| January 25, 1974 | Cause docketed on its merits. |
| January 29, 1974 | Original Papers filed. |
| February 26, 1974 | Printed Record and Acknowledgment of Proof of Service filed. |
| March 11, 1974 | Brief of Appellant and Acknowledgment of Proof of Service filed. |
| April 10, 1974 | Brief of Appellee and Acknowledgment of Proof of Service filed. |
| May 10, 1974 | Motion by Lawyers for Housing for leave to file brief of amicus curiae and Acknowledgment of Proof of Service filed. |
| May 16, 1974 | Leave to Lawyers for Housing to file brief amicus curiae. C. William O'Neill. J. 52-437 |
| May 31, 1974 | Brief of Amicus Curiae and Acknowledgment of Proof of Service filed. |
| November 13, 1974 | Hearing on the merits. |
| March 19, 1975 | Judgment reversed. J. 53-149 |
| March 28, 1975 | Motion for Rehearing and Certificate of Service filed by Appellee. |
| April 3, 1975 | Memorandum opposing rehearing and Certificate of Service filed. |
| April 17, 1975 | Rehearing Denied. J. 53-;97 |
| April 17, 1975 | Mandate Issued. |
| April 17, 1975 | Certified copy of entry sent Clerk. |

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| May 6, 1975 | Original papers sent to Clerk. |
| May 8, 1975 | Notice of Appeal to United States Supreme Court filed. |
| May 21, 1975 | Certified Transcript mailed to United States Supreme Court. |
| July 9, 1975 | Motion to Stay pending appeal and Certificate of Service filed. |
| July 9, 1975 | Memorandum opposing Stay and Certificate of Service filed. |
| July 10, 1975 | Execution of Judgment stayed for 20 days pending appeal. C. William O'Neill. J. 53 |
| October 20, 1975 | Entry from United States Supreme Court filed—Certiorari Allowed. |

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title omitted in printing)

**COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND EQUITABLE RELIEF**

(Filed April 14, 1972)

Complaining of defendants, plaintiff says that:

1. Plaintiff is a corporation organized under the laws of the State of Ohio and is the owner of certain property, hereinafter described, within the limits of the City of Eastlake, Lake County, Ohio. The defendants are the City of Eastlake, a municipal corporation in Lake County, Ohio; the City Planning Commission of the City of Eastlake; and the Board of Elections of Lake County, Ohio.



2. The real property material hereto was, at all times material hereto, owned by the plaintiff and is described as follows:

"Situated in the City of Eastlake, County of Lake, and State of Ohio, and known as being part of Original Willoughby Township, Lot No. 5 in Tract No. 14 and Lot No. 4 in Card Tract and further bounded and described as follows: Beginning at a point in the centerline of Vine Street, (60 feet wide) being distant South 89° 42′ 14″ East measured along said centerline 34.09 feet from its point of intersection with the Westerly line of land conveyed to Ernestine Greenberger by deed dated May 22, 1951, recorded in Volume 299, Page 375 of Lake County Deed Records, Thence South 0° 00′ 57″ East and parallel to said Westerly line of Greenberger 931.99 feet to the principal place of beginning of the premises herein intended to be described:

COURSE I Thence continuing South 0° 00′ and 57″ East and parallel to said Westerly line of Greenberger and the Southerly prolongation thereof, 709.15 feet to a point;

COURSE II Thence South 89° 59′ 03″ West, 485.43 feet to a point in the Easterly line of Shorelands No. 3 Allotment as recorded in Volume D of Maps, Page 31 of Lake County Records;

COURSE III Thence North 0° 03′ 38″ East, along said line of Shorelands No. 3 Allotment, 663.08 feet to a point at the Northeasterly corner thereof;

COURSE IV Thence South 89° 46′ 17″ West, along the Northerly line of said Shorelands No. 3 Allotment 179.50 feet to a point in the centerline of East 337 Street (60) feet wide;

COURSE V Thence North 0° 41′ 05″ West along said centerline of East 337 Street, 43.49 feet to a point;

COURSE VI Thence North 89° 42′ 14″ East and parallel to said centerline of Vine Street, 664.57 feet to the place of beginning and containing 8.0618 Acres of land, be the same more or less, but subject to all legal highways.

(EASEMENT) Situated in the City of Eastlake, County of Lake and State of Ohio, and known as being a part of Lot 4, Card Tract, in said City and is further bounded and described as follows: Beginning in the centerline of Vine Street at the Northwest corner of land conveyed to Ernestine Greenberger by deed recorded in Volume 299, Page 375 of Lake County Records of Deeds, said point being the place of beginning of the premises herein intended to be described:

COURSE I Thence North 89° 42′ 14″ West, along said centerline of Vine Street, a distance of 34.09 feet to the Northwest corner of lands conveyed to Howard & Morris Abrams by deed recorded in Volume 542, Page 281 of Lake County Records of Deeds;

COURSE II Thence South 0° 00′ 57″ West, along the Westerly line of lands of said Abrams 931.99 to the North line of Lot 5, Tract 14 also known as the Gore line;

COURSE III Thence North 89° 46′ 17″ East 34.09 feet along the North line of said Lot 5, to the Westerly line of land conveyed to said Ernestine Greenberger;



COURSE IV Thence North 0° 00′ 57″ East, along the West line of said Greenberger a distance of 976.30 feet to the place of beginning, be the same more or less, but subject to all legal highways."

3. Prior to May 18, 1971, the above-described real property was zoned for limited industrial use (M-2 District) under the zoning ordinances of the City of Eastlake. On or about May 18, 1971, plaintiff filed its application, in accord with the zoning ordinances of the City of Eastlake for a change in such zoning to multi-family high rise use (R-MF-HR District). Thereafter such application was processed by the defendant City Planning Commission and City Council of the City of Eastlake and, on December 28, 1971, the said Council enacted ordinance 1971-168 which provided that section 1143-03 of the Codified Ordinances of the City of Eastlake was amended to change the zoning use classification of the said property in accord with plaintiff's application from limited industrial use to multi-family high rise use.

4. Plaintiff was, at all times material hereto, and now is desirous of, willing and able to construct one or more high rise buildings on the subject property. To such end, on April 6, 1972, plaintiff applied to the defendant City Planning Commission for "parking and yard approval" of its proposed high rise building project and paid the necessary fee required for the submission of such application. At its regular meeting held on said date, defendant City Planning Commission denied the said application for the reason that the property in question was not zoned for plaintiff's proposed use on the ground that ordinance 1971-168 described above had never become effective by virtue of Article VIII, Section 3 of the Charter of the City of Eastlake.

5. In denying plaintiff's application, defendant City Planning Commission relied exclusively on the provisions of Article VIII, Section 3 of the Charter of the City of Eastlake set forth in full text in Exhibit "A" attached to this Complaint. Said provisions were adopted as an amendment to the Charter of the City of Eastlake at a regular municipal election held on November 2, 1971, pursuant to an initiative petition. The initiative petition was circulated and filed, and said election was held during the pendency of plaintiff's application for rezoning of the subject property before the defendant City Planning Commission and City Council of the City of Eastlake.

6. In substance, the charter provisions in question provide that no ordinances dealing with zoning, land use or development shall become effective until approved at a mandatory referendum election by a 55% affirmative vote of the electorate, the cost of which election must be borne by the owner of the land affected.

7. Plaintiff has complied with all the requirements of the applicable ordinances of the City of Eastlake, and all applicable administrative procedures. But for the charter amendment described in the preceding paragraph, plaintiff would be permitted to proceed with proposed use of the subject real property.

8. The provisions of Article VIII, Section 3 of the City Charter set forth in Exhibit "A" hereto, may not lawfully be applied to plaintiff's property by reason of the pendency of plaintiff's application at the time of the adoption of said Charter amendment.

9. The provisions of Article VIII, Section 3 of the City Charter set forth in Exhibit "A" hereto are violative of the constitutions of the United States and the State of Ohio in the following particulars among others:



a. In that said provisions deprive plaintiff of its property without due process of law; and

b. In that said "mandatory referral" of any change in the zoning map is an abdication of legislative and administrative responsibility and violation of separation of powers and deprives plaintiff of procedural due process;

c. In that said provision deprives plaintiff of the equal protection of the laws; and

d. In that said provision contravenes the provisions of the Constitution of Ohio dealing with referendum and initiative.

10. Plaintiff has invested large sums of money, and expended considerable time and effort in the preparation of plans and other steps preliminary to construction of its high rise project on the subject property. Unless the defendant City Planning Commission is ordered to process and approve plaintiff's application for parking and yard approval in the light of zoning as establishing by ordinance 1971-168 and without regard to a mandatory referendum under Article VIII, Section 3 of the Charter of the City of Eastlake, as amended, plaintiff will sustain grave and irreparable injury for which it has no adequate remedy at law.

11. The provisions of Article VIII, Section 3 of the Charter set forth in Exhibit "A" hereto, which require that an owner of real property affected by an ordinance involving land use or development agree to assume all costs of the mandatory referendum election provided for in said sections, and to post a bond with the City Auditor to secure said costs. Plaintiff has refused to do so and, notwithstanding such refusal, the defendant City of Eastlake has caused ordinance 1971-168 to be certified to the defendant Board of Elections to be referred to the elec-

torate at the election of May 2, 1972. Unless restrained and enjoined, the defendant Board of Elections will cause said question to be voted upon at the election of May 2, 1972, will count the votes for and against said proposition, and will certify the result thereof.

12. Plaintiff would sustain grave and irreparable injury for which it has no adequate remedy at law if such election were held, the votes counted, and the result certified.

WHEREFORE, plaintiff prays judgment against the defendants as follows:

1. A judgment declaring that the amendment to Article VIII, Section 3 of the Charter of the City of Eastlake adopted at the general election of November 2, 1971 is unconstitutional, void and of no effect;

2. A permanent mandatory injunction directing the defendant City Planning Commission to consider and approve plaintiff's application for parking and yard approval with respect to the subject property under ordinance 1971-168 and the balance of the zoning ordinances of the City of Eastlake without regard to the provisions of Article VIII, Section 3 of the Charter of the City of Eastlake adopted on November 2, 1971.

3. A preliminary injunction which, upon final hearing would become permanent, restraining and enjoining the defendant Board of Elections from:

a. Submitting or causing to be submitted the question of the effectiveness of Eastlake Ordinance 1971-168 at the election to be held on May 2, 1972;

b. Counting or causing to be counted any votes cast for or against said proposition; and



c. Certifying the result of such votes to the Auditor or Council of the City of Eastlake.

4. Such other relief as may be appropriate in the premises.

/s/ Timothy F. McMahon
/s/ Michael M. Hughes
Thompson, Hine & Flory
*Attorneys for Plaintiff*

**Note:**

Exhibit "A" to Plaintiff's Complaint omitted in printing which Exhibit is a copy of the Eastlake Charter Amendment printed on page 69 of this Appendix.

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title omitted in printing)

## ANSWER OF DEFENDANTS, THE CITY OF EASTLAKE AND THE CITY PLANNING COMMISSION OF THE CITY OF EASTLAKE

(Filed May 4, 1972)

Defendants, The City of Eastlake and the City Planning Commission of the City of Eastlake, for answer to the Complaint of plaintiff, state as follows:

1. Admit the allegations of Paragraph Nos. 1, 2, 3, 4, 5, and 6, of plaintiff's Complaint.

2. Deny the allegations of Paragraph Nos. 7, 8, 9, a, b, c, d, 10, 11, and 12, of plaintiff's Complaint.

3. These answering defendants further state that the Amendment to Article VIII, Section 3 of the Charter of the City of Eastlake, which was duly adopted at the General Election of November 2, 1971, is constitutional, valid and in full force and effect, from and after its date of enactment.

WHEREFORE, these answering defendants pray as follows:

1. That the Court declare the Amendment to Article VIII, Section 3 of the Charter of the City of Eastlake is constitutional, valid, and in full force and effect as it applies to plaintiff's property.

2. That in the event the Court determines that any section or part of the Amendment to Article VIII, Section 3, the Charter of the City of Eastlake, is invalid, that such determination shall not impair the validity, force, or effect, of any other section or part thereof as provided by Article XI, Section 4, of the Charter of the City of Eastlake.

3. That the Court deny plaintiff's petition requesting preliminary and permanent injunctions as therein prayed for.

4. That plaintiff's Complaint be ordered dismissed at plaintiff's cost.

/s/ J. Melvin Andrews
*Attorney for Defendants, The City of Eastlake and The City Planning Commission of the City of Eastlake*

(Certificate of Service omitted in printing)



IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title omitted in printing)

## TRANSCRIPT OF PROCEEDINGS

(August 31, 1972)

APPEARANCES:

*On behalf of the Plaintiff:*
Thompson, Hine & Flory
By: Mr. Michael M. Hughes

*On behalf of Defendants City of Eastlake and Eastlake Planning Commission:*
Andrews & Illenberger
By: J. Melvin Andrews

[2] BE IT REMEMBERED that heretofore, to-wit, at the April A.D. 1972 Term of said Court, on Thursday the 31st day of August, 1972, this cause came on to be heard in Courtroom No. 1, before the Honorable John F. Clair, Jr., Judge of said Court.

Thereupon, the following proceedings were had:

Mr. Hughes: Good afternoon, your Honor.
The Court: Are you ready to proceed?
Mr. Hughes: Yes, your Honor. My name is Michael Hughes, I represent Forest City Enterprises in this case. I believe that Mr. Andrews and I have agreed as to the facts and legal issues involved in this case.

May I say first, your Honor, that insofar as the complaint seeks any relief against the Lake County Board of Elections, we would specifically dismiss them as a Defendant in this case.

As background on that aspect of the case, this lawsuit was filed a short time before the May primary election, and it sought as its third branch of its prayer for relief preliminary and permanent injunction against the Board of Elections from submitting the Ordinance which is the subject of this case to the referendum election on the primary date in May; but we were unable to [3] get a hearing on our motion for preliminary injunction until after the election had been held, and in June of this year we specifically dismissed the motion for preliminary injunction.

I think that the issues remain however in the case, other than those directed to the Board of Elections or to the holding and certifying the result of the election; and there I would ask leave, or I would dismiss the Board of Elections from the case.

With regard to the balance of the matter, it is my intention on behalf of the Plaintiff to submit the case on the first six (6) paragraphs of the complaint which have been admitted by the Defendant.

We also, I think, have agreed this afternoon to submit a copy of the charter, the charter amendment, and the relevant ordinances to the Court by agreement.

Other than that the Plaintiff will offer no evidence in the case, and I would just ask leave to incorporate my complaint in the opening statement. We will be, in essence, submitting this on the pleadings and on additional copies of the relevant charter and ordinances.

[4] I have a trial memorandum to submit to the Court. I think this is essentially a question of law, your Honor, and I'm sure Mr. Andrews will want to respond to it, of course.

Mr. Andrews: Well, I am essentially in agreement with the comments that have just been made. I think we're dealing here only with a legal issue, and I think the



legal issue can be fairly and squarely presented to the Court through the pleadings and through such other ordinances and the charter of the City of Eastlake as we may introduce to the Court.

I would ask that the Court take the matter under advisement, or the case under advisement, and set time limits within which to file first the plaintiff's brief, and the defendant's brief on behalf of the defendant. In view of the serious nature of the question involved here, and the fact that it involved a lot of people, I would want a minimum of thirty (30) days in which to prepare my brief in the case. I think it would merit considerable legal research in order to be able to present to the Court all possible cases which may be material to the issues in this case.

[5] Mr. Hughes: We will file ours at this time, your Honor, so that we won't need any additional time; but I would like leave of perhaps ten (10) days after the defendant files his for a reply brief.

The Court: I take it the results of the election are not pleasing to you?

Mr. Hughes: Yes, I should have said that, your Honor; whether they were pleasing or not, they were not satisfactory.

The Court: I've marked it heard and submitted. Thirty (30) days for the defendant's brief and ten (10) days for the reply brief. You're filing your brief today?

Mr. Hughes: Yes, your Honor. And at this time I would offer, so the Court has copies, copies of the two ordinances referred to in the complaint and the charter amendment which, by the way, is attached to the complaint as Exhibit A and has been admitted.

Can we mark these as joint exhibits, Mr. Andrews?

Mr. Andrews: Oh, mark them Plaintiff's exhibits, it's all right.

[6] (Plaintiff's Exhibits Nos. 1, being a charter amendment; 2, being Ordinance 1971-168; and 3, being Ordinance 1972-2, were marked for identification.)

The Court: They will be admitted.

Thereupon, Plaintiff's Exhibits Nos. 1, 2 and 3 were offered and received in evidence, and are enclosed herewith and made a part of this record.

Mr. Hughes: I have also, your Honor, a copy of the charter, but my copy is marked up and I would ask leave to submit another copy to the Court in a day or two, when I can obtain one.

The Court: Certainly. I have to take judicial notice of that anyway.

Mr. Hughes: I know, your Honor; but I thought it would be convenient for the Court to have a copy in the file.

The Court: Thank you. Is there anything further to be discussed at this time?

Mr. Hughes: Nothing for the Plaintiff, your Honor. We're waiving oral argument and submitting it on the brief.

Mr. Andrews: That is correct.

Mr. Hughes: That's fine, your Honor.

The Court: Thank you.

[7] The above and foregoing, together with the exhibits offered and received in evidence, was all of the proceedings taken upon the trial of this cause in said Court of Common Pleas, in and for Lake County, Ohio.



IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title omitted in printing)

## OPINION

(Filed October 27, 1972)

Plaintiff is the owner of real property located in the City of Eastlake and sought to have the property rezoned from limited industrial to multi-family high rise.

An application for such rezoning was filed on May 18, 1971 and on December 28, 1971 Council of the City of Eastlake enacted an Ordinance providing the necessary zoning change.

However, on November 2, 1971 the voters of the City of Eastlake adopted Art. VIII, Section 3 of their Charter which provided that any Ordinance changing any zoning or land use in the City must be submitted to the voter and receive a 55% affirmative vote.

The Ordinance in question did not receive the necessary votes and brings this action challenging the constitutionality of the Charter Amendment.

The first challenge is that the provision of the Charter may not be applied to property such as the plaintiff's as their application was pending when the Amendment to the Charter was adopted.

Plaintiff cites a number of cases where zoning was changed after application was made for a permit, such is not the case here. The zoning has not been changed and the effect of the Charter Amendment is to change the methods to obtain a change.

The next challenge is that the Amendment offends both the Federal and State Constitution as follows:

1. It constitutes an improper abdication of the legislative duties of Council, citing, *James v. Valtierra*, 402 U.S. 137. This Court is of the opinion that this case tends to establish the right of the City to adopt such a Charter Amendment. There is no question that the adoption of zoning requirement is a legislative act. But that is not what this Amendment does. What it does do, is preserve to the electors of Eastlake, the right to review the legislation adopted by their Planning Commission and their Council.

The next challenge is that the Amendment is violate [sic] of the due process clause.

A) The need to refer for a referendum without standard or citeria. The Court has already pointed out that the Council retains the standards and make the change, the people merely adopt or reject the Ordinance as submitted, they do not create the legislation.

The next challenge is the 55% requirement of the Amendment but cites no authority for this claim.

The next claim is the assessment of the costs of the election to the property owner. The Court is of the opinion that such provision is unconstitutional.

It is true that the Amendment refers to the applicant but suppose the change proposed to be made is originated by the Planning Commission who then is the applicant, or if the change proposed effects others than the applicant. This would not, however invalidate the balance of Amendment.



The defendant further argues that by reason of the Amendment it would be subject to arbitrary and unreasonable action. No such evidence was presented to this Court, if such facts do in fact exist, the Court would still be available to grant relief in such cases.

Lastly, the plaintiff charges that the Amendment offends the referendum provisions of the Ohio Constitution. No citation or other authority is offered in support of this contention.

A somewhat similar mandatory referendum requirement was approved by the U. S. Supreme Court in *Shaffer v. Veltierra*, 402 U. S. 137, see also, *Hunter v. Erickson*, 393 U. S. 385.

The Court makes no comment on the wisdom of what appears to be a cumbersome method of changing zoning to meet changing times.

The Court is of the opinion that the presumption of the validity of Amendment must prevail and declares the amendment to be constitutional except as to the assessment of costs of the election.

Prevailing counsel will prepare a judgment entry in accordance with this opinion and the Rules of this Court.

John F. Clair, Jr.

*Judge of the Court of Common Pleas*

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title omitted in printing)

**JUDGMENT ENTRY**

(Filed November 9, 1972)

This cause came on for hearing on the pleadings, the evidence, stipulations, and briefs of counsel, after having been regularly assigned for trial, and on consideration thereof, the Court finds and declares Article VIII, Section 3 of the Eastlake Charter, as enacted at the General Election on November 2, 1971, to be valid and constitutional, except for the provision thereof requiring the applicant for such rezoning to assume and pay the costs of the election, which provision the Court finds and declares to be unconstitutional.

The Court further finds and declares that Article VIII, Section 3 of the Eastlake Charter is fully applicable to plaintiff's property as described in plaintiff's Complaint.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint for preliminary and mandatory injunctive relief be ordered dismissed at plaintiff's costs. Exceptions noted for the plaintiff.

/s/ John F. Clair, Jr.
*Judge of the Court of Common Pleas*



COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT

(Title omitted in printing)

**OPINION OF THE COURT OF APPEALS AS TO THE APPEAL**

(Filed July 23, 1973)

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties. Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each assignment of error was reviewed and upon review the following disposition was made:

This is an appeal from a judgment of the Common Pleas Court.

The facts are not in dispute. Plaintiff-appellant owns certain property in the City of Eastlake. Prior to May 18, 1971 it was zoned for limited industrial use. On May 18, 1971 appellant filed an application for a change in the zoning to multi-family high rise use. The application was processed by the City Planning Commission and City Council and finally the change in zoning classification was approved by Council in Ordinance 1971-168.

Article VIII, Section 3 of the Charter of the City of Eastlake provides that no ordinance dealing with zoning, land use or development shall take effect until after a mandatory referendum election is held at which the ordinance receives a 55% affirmative vote, the cost of the election being borne by the owner of the real property affected.

The sole question before this court is whether Article VIII Section 3 of the Charter of the City of Eastlake is constitutional.

The answer is yes.

Article II Section 1f of the Ohio Constitution states:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; *such powers shall be exercised in the manner now or hereafter provided by law.*" (Italics ours)

RC 731-29 reads as follows in pertinent part:

> "Any ordinance or other measure passed by the legislative authority of a municipal corporation shall be subject to the referendum except as provided by section 731.30 of the Revised Code. No ordinance or other measure shall go into effect until thirty days after it is filed with the mayor of a city or passed by the legislative authority in a village, except as provided by such section.
>
> "When a petition, signed by ten per cent of the number of electors who voted for governor at the next preceding general election for the office of governor in the municipal corporation, is filed with the city auditor or village clerk within thirty days after any ordinance or other measure is filed with the mayor or passed by the legislative authority of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such auditor or clerk shall, after ten days, and not later than four p.m. of the nine-



> tieth day before the day of the election, certify the petition to the board of elections. . . ."

Article VIII Section 3 of the Eastlake Charter states in pertinent part as to zoning amendments:

> ". . . That in the event the city council should approve any of the preceeding changes, or enactments, whether approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election. . . ."

A cursory reading of RC 731.29 and Article VIII Section 3 of the Charter of Eastlake clearly reveals that RC 731.29 requires a petition signed by ten per cent of the number of electors who voted for governor at the next preceeding election for the office of governor in the municipal corporation as a prerequisite to submitting a referendum on a municipal ordinance to the voters of the municipality whereas Article VIII Section 3 of the Eastlake Charter requires no petitions signed by electors of the City of Eastlake as a prerequisite to a referendum on a zoning change ordinance, in fact requires a mandatory referendum on every zoning change ordinance approved by council.

RC 731.41 states:

> "Sections 731.28-731.41, inclusive, of the Revised Code do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures."

The Supreme Court of Ohio held in *State ex rel. Bramblette v. Yordy*, 24 OS 2d 147 on page 150:

> "In providing for referendum, however, a municipal charter is not restricted to the addition of the same provisions enacted by the General Assembly. It may be less restrictive as to use of the referendum, as was the Charter of the City of Toledo which authorized referendum, on all ordinances, including one levying a tax passed as an emergency measure, State ex rel. Snyder vs. Bd. of Elections (1946), 78 O App 194. It may be more restrictive, as in Dillon v. Cleveland, supra 117 Ohio St. 258, where a referendum would have been required under said law, but was not required under the provisions of the Charter of the City of Cleveland."

Therefore, we are of the opinion that that portion of Article 2 Section 1f of the Ohio Constitution which says that "such powers shall be exercised in the manner now or hereafter provided by law" refers to the provisions of a municipality's charter if said charter has provisions for initiative and referendum relative to its own ordinances or, where there are no charter provisions, the exercise of such power is only provided for by the General Assembly.

In the instant case, the charter of the City of Eastlake provides for a referendum on all ordinances containing zoning changes, a provision which is "less restrictive as to the use of the referendum", but which is a permitted provision of the Charter "law" under the "home rule" provisions of the Constitution.

In our opinion, Article VIII Section 3 of the Eastlake Charter is not in conflict with Article 2 Section 1f of the Ohio Constitution. In fact, Article VIII Section 3 of



the Eastlake Charter is permitted under Article XVIII Section 3 in the Ohio Constitution.

Judgment affirmed.

Robert E. Cook
*Judge*

Jones, *P.J.*
Hofstetter, *J.*, concur.

## OPINION OF THE COURT OF APPEALS AS TO THE CROSS APPEAL

(Filed August 28, 1973)

Cook, *J.*

Coming now to the cross appeal of the appellees, City of Eastlake, et al., which states that "the portion of the judgment of the Court of Common Pleas, which found unconstitutional the provision of the Eastlake Charter Amendment requiring assessment of the costs of election to the effected [sic] property owner is contrary to law".

In our opinion, the trial court should be affirmed as to its conclusion that the portion of the Eastlake charter that assesses the cost of referendum on a proposed zoning change to the applicant is unconstitutional.

In State, ex rel., Ayres, 142 OS 216, the Supreme Court of Ohio held:

> "Under the mandatory provisions of Section 2, Article X and Section 1, Article XVII of the Constitution of Ohio, and the statutes passed pursuant thereto, all matters pertaining to the conduct of election are state functions."

Pursuant to said constitutional provision the legislature of the State of Ohio enacted RC 3501.17 in which it provided that the costs of special elections held either on the regular primary or general election days or on a day other than the day of a primary or general election should be charged to the political subdivision involved.

Therefore, any provision in a charter of a municipality attempting to assess the cost of an election for a referendum on a proposed zoning change to the applicant is in violation of the Ohio Constitution and RC 3501.17.

Judgement on cross appeal is affirmed.

Judge Robert E. Cook

Jones, *P.J.*

Hofstetter, *J.*, concur.

COURT OF APPEALS OF OHIO

ELEVENTH APPELLATE DISTRICT

(Title Omitted in printing)

**JOURNAL ENTRY OF THE COURT OF APPEALS**

(Filed September 11, 1973)

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial as to appeal by appellant and the Cross-Appeal of appellee, and, therefore, the judgment of the Trial Court is affirmed. Each assignment of error was reviewed by the Court and disposed of as set forth in this Court's Announcement of Decision and Opinion, of earlier date, which is incorporated herein by reference.



It is ordered that appellee recover of appellant the costs herein taxed.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Robert E. Cook
George M. Jones
Edwin T. Hofstetter
*Judges*

IN THE SUPREME COURT OF OHIO

(Title omitted in printing)

**Note:**

The Opinion and Judgment of the Ohio Supreme Court are printed in the Petition for Certiorari at pages A13 and A38 respectively.

IN THE SUPREME COURT OF OHIO

(Title omitted in printing)

**ORDER OVERRULING MOTION FOR REHEARING**

(Entered April 17, 1975)

It is ordered by the court that rehearing in this case is denied.

# THE CHARTER OF THE CITY OF EASTLAKE

(Effective January 1, 1954)

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# CHARTER

## of the

# CITY OF EASTLAKE

EDITOR'S NOTE: This Charter became effective January 1, 1954; See Article X, Section 6.

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## ARTICLE I

### Preamble

We, the people of the City of Eastlake, in the County of Lake, and State of Ohio, within the boundaries, as now established in the manner provided by the laws of the State of Ohio, and as incorporated in this Charter, do hereby adopt this Charter for the government of the City of Eastlake in order to secure the benefits of municipal home rule and to exercise all the powers of local self-



government under the Constitution and the laws of the State of Ohio.

### Section 1. Names and Boundaries.

The Municipality now existing in the County of Lake, State of Ohio, and known as the City of Eastlake, shall continue to be a body politic and corporate under the name of the City of Eastlake, with the same boundaries as now exist, but with power and authority to change its boundaries in the manner authorized by the laws of the State of Ohio, except that no territory shall be detached from or annexed to or merged with, any body politic, nor shall the corporate existence of the City of Eastlake be terminated, without the assent of a majority of the electors of the City voting on such proposal. Any such question shall be submitted to the electors at a regular municipal or general election in such manner as the Council shall by resolution or ordinance prescribe.

### Section 2. Powers.

The Municipality shall have all the powers of local self-government now or hereafter granted to municipalities by the Constitution of the State of Ohio, and such further powers as are now or hereafter granted by the laws of the State of Ohio; and all such powers shall be exercised in the manner prescribed by this Charter, or, to the extent that the manner is not prescribed herein, in such manner as the Council may prescribe by ordinance. The powers of the Municipality may also be exercised, except as a contrary intent appears in this Charter or in the enactments of the Council conformably hereto, in such manner as may now or hereafter be provided by the general laws of Ohio. Enumeration of, or reference to particular powers by this Charter shall not be construed to be exclusive.

## ARTICLE II

### Nominations and Elections

#### Section 1. Procedures

Nominations for elective offices of the City shall be made only by petition, filed with the Board of Elections, not later than 6:30 P.M. of the 90th day prior to the regular municipal election. Candidates at large shall file a petition signed by qualified electors of the City, not less in number than three (3%) percent of the number voting in the City at the last preceding regular municipal election. Candidates for Ward Councilmen shall file a petition signed by qualified electors in their respective Wards of not less in number than three (3%) percent of the number voting in such Ward at the last preceding regular municipal election. The nomination of each candidate shall be made by a separate petition. No primary election shall be held for the selection of any candidate for any elective office of this City; and no nomination for any such office shall be of any effect unless made as required by this Section 1. The ballot used in the election of officers of the City shall be without party mark or designation. Ballot labels on voting machines, used in the election of officers of this City shall be without party mark or designation. The names of all candidates for any City office shall be placed upon the same ballot and shall be rotated in the manner provided by the laws of the State of Ohio. Except as otherwise provided in this Charter, the laws of Ohio shall govern the nomination and election of the elective officers of this City.

#### Section 2. Vacancies in Elective Offices

The office of an elected officer of the City shall become vacant upon his death, resignation, or recall pursuant



to Article III, Section 2, and shall also be declared vacant by resolution of the Council if such officer shall remove from the City, or from his Ward in the case of a Ward Councilman, or if it shall be found that he did not reside in the City, or in the case of a Ward Councilman, in his Ward, continuously for a period of three years preceding his election; or if he shall draw regular compensation from any other public body; or if he shall have any financial interest in any contract to which the City is a party.

## ARTICLE III

### Initiative, Referendum and Recall

#### Section 1. Initiative, Referendum

Ordinances and other measures may be proposed by initiative petition and adopted by election, and ordinances and other measures adopted by the Council shall be subject to referendum, to the extent and in the manner now or hereafter provided by this Charter or the laws of Ohio.

#### Section 2. Recall

The electors shall have the power to remove from office by a recall election any elected officer of the City. If an elected officer shall have served for six months of his term, a petition demanding his removal may be filed with the Clerk of the Council, who shall note thereon the name and address of the person filing the petition and the date of such filing. Such petition may be circulated in separate parts, but the separate parts shall be bound together and filed as one instrument. Each part shall contain the name and office of the person whose removal is sought and a statement in not more than two hundred (200) words of the grounds for the removal. Such petition shall be signed by at least that number of electors

which equals 20% of the electors voting at the last regular municipal election. Within ten (10) days after the day on which such petition shall have been filed, the Clerk shall determine whether or not it meets the requirements hereof. If the Clerk shall find the petition insufficient, he shall promptly certify the particulars in which the petition is defective, deliver a copy of his certificate to the person who filed the petition with him, and make a record of such delivery. Such person shall be allowed a period of twenty (20) days after the day on which such delivery was made in which to make the petition sufficient. If the Clerk shall find the petition sufficient, he shall promptly so certify to the Council, and to the officer whose removal is sought, and shall make a record of such certification and the time thereof. If such officer shall not resign within five days after the day on which such delivery shall have been made, the Council shall thereupon order and fix a day for holding a recall election, not less than sixty, nor more than seventy-five days after the date of the clerk's certification of sufficiency. Such recall elections shall be certified to the Board of Elections and held in accordance with the general laws of Ohio. At such recall election, the following question shall be placed on the ballot: "Shall (name of officer) be allowed to continue as (name of office)?" with provision on the ballot for voting affirmatively or negatively on such question. If a majority of the votes cast at such election shall be voted affirmatively, such officer shall remain in office. If a majority of the votes cast shall be voted negatively, such officer shall be considered as removed and his office shall be deemed vacant, and such vacancy shall be filled as provided in this Charter. The officer removed by such recall election shall not be eligible for appointment to the vacancy created thereby.



## ARTICLE IV

## Mayor

### Section 1. Term of Office

The Mayor shall be elected for a term of two (2) years, and assume office on the first day of January following his election, and serve until his successor is elected and qualified. Until such time as the financial affairs of this Municipality shall warrant, the Mayor shall be a part time officer, this to be decided by a two thirds (2/3) vote of all the members elected to Council and his office shall be at the City Hall.

### Section 2. Qualification

The Mayor shall have been for at least three (3) years prior to his election and shall continue to be a resident of the Municipality, also that he shall have been a qualified elector of same. He shall not hold any other public office or employment, except as otherwise provided in this Charter or ordinance, and except that of Notary Public, membership in the State Militia or Reserve Corps of the United States.

### Section 3. Judicial Powers

The Mayor shall have all the judicial powers granted by the general laws of the State of Ohio, to Mayors of the class of this Municipality.

### Section 4. Legislative Powers

The Mayor shall attend all meetings and be entitled to a seat in Council. He shall not have a vote in Council, but shall have the right to introduce ordinances and resolutions and to take part in the discussion of all matters coming before the Council.

### Section 5. Veto

All ordinances and resolutions of the Council shall be signed by its presiding officer and attested by the Clerk of Council. They shall be presented to the Mayor, by the Clerk, within forty-eight (48) hours after passage by the Council. If the Mayor approves such ordinance or resolution, he shall sign it forthwith and return it to Council. If he does not approve it, he shall return it within ten (10) days after it is presented to him, with a statement of his objections to the Council, who shall enter his objections on its Journal. The Council may then reconsider the vote on the passage of such legislation not later than at its next regular meeting. If, on reconsideration, it is approved by two thirds (2/3) of all the members elected to Council, it shall become effective. If any ordinance or resolution shall not be returned by the Mayor within ten (10) days after it was presented to him, it shall become effective in the same manner as if he had signed it. The Mayor may disapprove any item or items of an ordinance making an appropriation of money, and item or items so disapproved shall be void unless repassed by the Council in the manner herein prescribed.

### Section 6. General Powers of the Mayor

The Mayor shall appoint the various department executives, subject to the approvals provided in this Charter, namely that of the Director of Law, Director of Finance, Director of Public Safety, and Director of Public Service, all within thirty (30) days after assuming office. He shall make such other appointments as provided by this Charter. In the case of resignation, death, or removal of any appointed official, the power of appointing a replacement shall remain with the Mayor providing such appointment is made within thirty (30) days. These



appointments of the Mayor, except as otherwise provided in this Charter, shall become official only when the Council has approved of the appointments by a two thirds (2/3) vote of all the members elected to Council. If the Mayor submits the name of any person or persons for the above named offices or appointments, and the Council fails to act within thirty (30) days on approving or rejecting the name or names for appointment, the name or names of the Mayor's appointments shall become effective as though they had received the approved vote of the Council. If the Council rejects any person or persons named as an appointee of the Mayor within the thirty (30) day period, it shall then become the duty of the Mayor to immediately make another appointment or appointments before or at the next regular Council meeting. The Mayor shall be the chief conservator of the peace within the City, and shall see that all ordinances, resolutions, and laws are faithfully obeyed and enforced. The Council shall receive from the Mayor and the Director of Finance, on or before the fifteenth of December of each year an annual estimate of revenues and expenditures for the succeeding year and he shall advise the Council as to the financial condition and needs of the Municipality including necessary appropriation measures. The Mayor, along with the Director of Finance, shall execute on behalf of the City, all contracts, conveyances, evidences of indebtedness, and other instruments to which the City is a party and shall at the first regular meeting in January report to Council concerning the affairs of the City.

### Section 7. Removal

The Council may remove the Mayor for gross misconduct, malfeasance, misfeasance, and nonfeasance in or disqualification for office, or for the conviction, while in office, of a crime involving moral turpitude, or for viola-

tion of his oath of office, provided however, that such removal shall not take place without the concurrence of at least two thirds (2/3) vote of all members elected to Council nor until the Mayor shall have been notified in writing of the charge against him at least ten (10) days in advance of any hearing upon such charge, and he or his counsel has been given an opportunity to be heard, present evidence, or examine any witness or witnesses in support of said charge.

### Section 8. Vacancy

If, and during any period, the Mayor shall be absent from the City or for any other cause is unable to perform his duties, or the office of Mayor otherwise becomes vacant, the President of Council shall fill such vacancy, temporary or permanent, as provided in Article V, Section 6, of this Charter.

## ARTICLE V

## The Council

### Section 1. Powers, Number and Terms

All the legislative powers of the City of Eastlake, except as limited by this Charter and the Constitution of Ohio, shall be vested in a Council of seven (7) members of whom three (3) members shall be elected at large and four (4) members of which shall be elected from Wards, one from each Ward.

Members of Council shall serve for a term of four (4) years, beginning on the first day of January next following their election and until their successors are elected and qualified except that the three members at large elected at the regular municipal election in 1955 shall serve for two (2) years and thereafter all Councilmen at large shall be elected for a four (4) year term.



### Section 2. Qualifications

No person shall be eligible to be a member of Council unless he shall been continuously a resident and qualified elector of the Municipality for at least three (3) years immediately prior to his election or appointment. No person shall continue to serve as a member of Council unless during his term of office, he shall continue to be a resident and a qualified elector of the Municipality, and, if elected or appointed from a Ward, shall continue to be a resident and qualified elector of his Ward. He shall not hold any other public office or employment within the Municipality, except that of Notary Public. No member of Council shall be interested in the profits or emoluments of any contract, job, work, or service for which monies of the Municipality are, or will be expended.

### Section 3. Removal

The Council shall be the judge of the election and qualifications of its own members. It may punish, or remove from the Council any member for gross misconduct, misfeasance, malfeasance, nonfeasance, disqualification for office, or for the conviction while in office of a crime involving moral turpitude, or for a violation of his oath of office, or persistent failure to abide by the rules of the Council or absence without justifiable excuse from three (3) consecutive regular meetings of the Council, provided however, that such punishment or expulsion shall not take place without the concurrence of 2/3 of all the members elected to Council; nor until the accused member shall have been notified in writing of the charge against him, at least ten (10) days in advance of a public hearing upon such charge, at which he or his counsel shall have been given an opportunity to be heard, present evidence and examine any witness appearing in support of, or against such charge.

### Section 4. Vacancies

Whenever the office of a Councilman shall become vacant, the vacancy shall be filled by a majority vote of all the remaining members of the Council. If the vacancy shall not be filled within thirty (30) days thereof the Mayor shall fill it by appointment. Each Councilman so elected or appointed to fill a vacancy, shall hold office for the balance of the unexpired term and until his successor is elected and qualified.

### Section 5. Meetings and Organization

At one o'clock P.M. on the first day of January next following each regular municipal election, Council shall meet at the Council Chambers of the Municipality for the purpose of organization. Thereafter, Council shall meet in regular session at such times as may be prescribed by its rules, regulations, ordinances or by-laws; but it shall hold regular meetings, at least, twice during each calendar month of the year, with the exception of the months of July and August, when during each of said months the Council may, at its discretion, dispense with one of its regular meetings. All meetings of the Council, whether regular or special, shall be open to the public.

### Section 6. President of Council

The Council shall at the time of its organization and every two (2) years thereafter choose one of its members as President of Council, who shall preside at all regular and special meetings of Council. When the Mayor is absent or inaccessible, or, for any reason, unable to perform his duties as Mayor, the President of Council shall become the acting Mayor, and while so acting shall have and exercise all the powers of the Mayor, but he shall not cease to be a Councilman, nor in any case shall he lose his right



to vote as a member of Council. In case of the death, resignation or removal of the Mayor, the President of Council shall forthwith become Mayor and his office as Councilman shall become vacant. If the office of President of Council becomes vacant, any vacancies in Council shall first be filled in the manner provided in Section 4, Article V, of this Charter, and thereupon a new President of Council shall be chosen by Council.

### Section 7. Clerk of Council

The Council shall choose a Clerk of Council and such other assistants as it shall determine from time to time; but the Council may designate the Director of Finance as the Clerk of the Council. The Clerk of Council shall keep the Journal of the proceedings of the Council and its records, and perform such other duties as Council may from time to time require.

### Section 8. Special Meetings

Special meetings of Council may be called by a vote of Council taken at any regular or special meetings; or special meetings may be called by the Mayor and shall be called by the Clerk of Council upon the written request of three members of Council. Any such vote or request, for the calling of a special meeting, shall state the subject or subjects to be considered at the meeting and no other subject or subjects shall be there considered, except on the approval of five (5) or more of the members of Council in attendance at the special meeting. Twelve (12) hours notice in writing of such special meeting, shall be given to each member of Council and the Mayor by personal service, or by leaving same at their usual places of residence; except that the members of Council shall be held to have waived such notice by their attendance at the special meeting.

### Section 9. Quorum

Two-thirds of all the members elected to Council shall constitute a quorum to do business, but a less number may adjourn from time to time and compel the attendance of absent members in such manner and under such penalties as may be prescribed by the rules of Council.

### Section 10. Procedure of Council

The Council shall determine its own rules and order of business consistent with this Charter. Council shall keep a journal of its proceedings, which shall be a public record. All legislative action, shall be by ordinance or resolution, except when otherwise required by the Constitution or the laws of the State of Ohio, but departmental procedure and administrative matters may be transacted by motion recorded on the Journal. On the passage of every ordinance or resolution, the vote shall be taken by yeas and nays which shall be entered on the Journal. No ordinance or resolution shall be passed without the concurrence of a majority of all the members elected to Council. Every ordinance and resolution shall be fully and distinctly read on three different days, unless 3/4 of all the members elected to Council vote to suspend this rule, taken by yeas and nays and entered on the Journal. An ordinance after having been fully read on its first reading may be read by title only on the second and third readings thereof, unless otherwise requested by any member of Council. No ordinance or resolution shall contain more than one subject, and such subject shall be clearly expressed in its title. Council may provide for the revision, rearrangement and codification of the ordinances of the Municipality or any portion thereof, at such time as Council may determine. All ordinances, resolutions, statements, orders, proclamations, notices and reports, required by law, or by this Charter, or by ordinances of Council to be published, may either be posted in five (5) of the most public places in the Municipality, as determined by Council for a period of not less than fifteen (15) days, or be published in a newspaper of general circulation in the Municipality, once a week for two consecutive weeks, as the Council may determine. All ordinances or resolutions upon their final passage shall be recorded in a book kept for that purpose and shall be authenticated by the signature of the presiding officer and Clerk of the Council, but failure to sign an ordinance or resolution for the purpose of authentication shall neither invalidate the ordinance nor impair its effectiveness. All ordinances and resolutions of a general or permanent nature, or involving the expenditure of money in which no emergency is declared shall take effect thirty (30) days after their passage by Council. Emergency ordinances, shall take effect, as provided by Section 11 of this Article V.



### Section 11. Emergency Ordinances

An emergency measure is an ordinance or a resolution necessary for the immediate preservation of the public peace, health or safety, or providing for the usual daily operation of a municipal department, and shall take effect, unless a later time be specified therein, upon passage by Council and the signature of the Mayor, or upon the expiration of the time within which it may be disapproved by the Mayor, or upon its passage after disapproval by the Mayor, as the case may be. Ordinances providing for the appropriation of money, or for an annual tax levy, or for improvements petitioned for by the owners of a majority of the front footage of the property benefited and to be specially assessed therefor, may be passed as and

take effect at the same time as emergency measures. No action of the Council in authorizing any change in the boundaries of the Municipality, or the surrender or joint exercise of any of its powers, or in granting any franchise, or in contracting for the supply to the Municipality or its inhabitants, of the product or service of any utility, whether municipally owned or not, shall ever be passed as an emergency measure. Emergency ordinances and resolutions, shall only be passed by a 2/3 vote of all the members elected to the Council and the reasons for declaring such ordinance or resolution an emergency measure shall be set forth, in the preamble or in one section of the ordinance or resolution.

### Section 12. Salaries and Bonds

The Council shall have the power to fix the salary of its own members and of each officer, employee and member of any department, board, or commission of the Municipality whether elected or appointed, except as otherwise provided in this Charter. Any such person may be required by the Council, from time to time to furnish bond in such sum as the Council shall determine and with such surety as shall be approved by the Mayor; and the Council may provide that the premium for any such bond shall be paid the Municipality. The compensation of the Mayor, each member of the Council, and any other elected official shall be fixed at least thirty (30) days before the time for the filing of the nominating petitions for the terms beginning on the next succeeding first day of January, and shall not thereafter be diminished or increased during such terms.



## ARTICLE V

## Administrative Offices and Departments

### Section 1. General Provisions

The following departments are hereby established by this Charter:

Department of Law
Department of Finance
Department of Public Safety
Department of Public Service

and the Council shall provide by ordinance for the organization thereof. The Council may by ordinance establish additional offices, positions, departments, boards or divisions thereof, and provide for them as it may deem necessary. With the exception of the Department of Finance and the Department of Law, the Council may combine or abolish existing departments and divisions as it may deem necessary, and may authorize one person to be the head of two or more departments or divisions. The Mayor may act as the head of the Department of Public Safety and the Department of Public Service.

### Section 2. Department of Law

The Director of Law shall be the head of the Department of Law, and shall be appointed by the Mayor, subject to confirmation of 2/3 of all the members elected to the Council. He may be removed from office by the Mayor, but such removal shall not take place without the concurrence of 2/3 of all the members elected to Council. He shall serve the Mayor, the Council, the administrative departments, and the officers, boards and commissions of the City as legal counsel in connection with municipal affairs, and subject to the direction of the Mayor

and/or Council, shall represent the City in all proceedings in court or before any administrative board. He shall perform all other duties now or hereafter imposed upon City Solicitors under the laws of Ohio, unless otherwise provided by ordinance of the Council, and he shall perform such other duties consistent with his office as the Mayor or the Council may request. No person shall act as Director of Law unless duly admitted to practice law in the State of Ohio.

### Section 3. Department of Finance

The Director of Finance shall be the head of the Department of Finance, and the fiscal officer of the City. He shall be appointed by the Mayor, subject to confirmation of 2/3 of all the members elected to the Council. He may be removed from office by the Mayor, but such removal shall not take place without the concurrence of 2/3 of all the members elected to the Council. He shall keep the financial records of the Municipality and of all monies received and expended, of all property owned by the Municipality, and all taxes and assessments levied and received. He shall keep and preserve such money in the place or places authorized by ordinance, and shall disburse the same as may be required by law or ordinance.

He shall not allow the amount set aside for any appropriation to be overdrawn or drawn for any other purpose.

He shall examine and audit the accounts of all other officers, employees and departments prior to the close of the fiscal year, or whenever required by Council.

He shall require evidence that the amount of any claim presented to him is due.



He shall be responsible for the preparation and submission to Council of appropriation measures, and shall assist the Mayor and Council in the preparation of estimates, budgets and other financial matters, and at all times, keep the Mayor and Council fully advised as to the financial condition and needs of the Municipality, and shall perform all other duties required by the Charter, the Mayor, or by ordinance of the Council, consistent with his office.

### Section 4. Department of Public Safety

The Director of Public Safety shall be the head of the Department of Public Safety and shall be appointed by the Mayor, subject to the confirmation of 2/3 of all the members elected to Council. He may be removed from office by the Mayor, but such removal shall not take place without the concurrence of 2/3 of all the members elected to the Council, provided, however, that if the Mayor acts as Safety Director, the Council may, by a vote of 2/3 of all the members elected to the Council remove him as such Safety Director, and thereupon another Safety Director shall be appointed.

The Director of Public Safety shall be the head of the Division of Police, Division of Fire, Division of Building Engineering and Inspection, and Division of Health. He shall make all necessary rules and regulations for the governing of the Department of Public Safety and the several divisions thereof, and he shall be charged with the duty of enforcing all police, health, safety and sanitary regulations that may be prescribed by ordinances or rules of the Municipality, or the general laws of the State of Ohio. The Director of Public Safety shall perform such other duties, consistent with his office, as may be required by this Charter, by ordinance of the Council, or as directed by the Mayor.

### Section 5. Department of Public Service

The Director of Public Service shall be the head of the Department of Public Service and shall be appointed by the Mayor, subject to confirmation of 2/3 vote of all the members elected to the Council. He may be removed from office by the Mayor, but such removal shall not take place without the concurrence of 2/3 of all the members elected to the Council, provided however, that if the Mayor acts as Service Director, the Council may, with the concurrence of 2/3 of all the members elected to the Council, remove him as such Service Director, and thereupon another Service Director shall be appointed. The Director of Public Service shall have charge of all public works and improvements and the construction thereof, and all engineering and inspection in connection therewith. He shall be charged with the construction, improvement, repair and maintenance of streets, sidewalks, alleys, lanes, bridges, wharves, docks and breakwalls; of water mains, pumps, systems, pipes, purification and filtration plants, and the water distribution system; of sewers, sewage systems, drains, ditches, culverts, streams, water courses and harbors; and of all public buildings, parks, playgrounds, cemetries, and other public grounds. He shall manage and control cemeteries, market houses, sewage treatment plants, water works, and all public utilities owned by the Municipality and shall enforce all the obligations of privately owned or operated public utilities enforceable by the Municipality. He shall have charge of the preservation and care of all surveys, maps, plans, drawings and estimates for public work; the cleaning, resurfacing, repairing, sprinkling and lighting of streets and public places; the collection and disposal of waste; and the preservation of all property belonging to the Municipality and pertaining to the functions thereof. He shall perform such other



duties, consistent with his office, as may be required by this Charter, by ordinance of the Council, or as directed by the Mayor.

## ARTICLE VII

## Civil Service

### Section 1. General Provisions

On and after the effective date of this Charter, the Civil Service of the City shall be divided into the unclassified and classified service as defined by the laws of Ohio and appointments to and promotions in the Civil Service of the City of Eastlake, Ohio shall be made only according to merit and fitness to be ascertained as far as practical by competitive examinations; and thereafter no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employee in the Civil Service of the City except as provided by the general laws of the State of Ohio.

### Section 2. Members, Qualifications, Terms

The Mayor shall appoint three persons, who shall be electors of the City of Eastlake and who shall constitute the Civil Service Commission of the City of Eastlake, provided, however, that members, of the existing Civil Service Commission of the City of Eastlake, shall continue in office for the terms for which they have been appointed and until their successors are appointed and qualified. The term of office of the members of the Commission shall not exceed six years and any vacancy occuring other than expiration of term shall be filled for the unexpired portion of the term only and in the manner designated above for the original appointments.

### Section 3. Powers

Said Civil Service Commission of the City of Eastlake shall be vested with all the powers and authority now, or hereinafter, granted to the municipal Civil Service Commissions by the general laws of Ohio and shall be subject to all the rules, regulations and limitations now, or hereinafter provided by the general laws of Ohio.

## ARTICLE VIII

### City Planning Commission

### Section 1. Powers and Duties

The Planning Commission shall have the power conferred upon it by the general laws of the State of Ohio to frame or adopt a plan or plans for dividing the Municipality or any portion thereof into zones or districts representing the recommendations of the Commission in the interests of public health, safety, convenience, comfort, prosperity or general welfare for the limitation and regulation of height, the bulk and location, (including the percentage of lot occupancy, set-back building lines, side lines and area and dimensions of yards, courts and other open spaces,) and the uses of buildings and other structures and/or premises in such zones and districts.

It shall adopt and recommend to the Council a comprehensive plan for the physical development of the Municipality, or the re-development of any area or district therein, which shall include the location of public ways, property, bridges, schools, utilities, buildings, parks, playgrounds, and recreation areas.

Further, the Commission shall be required to make and keep maps or plans of the whole or any portion of the Municipality. It shall be required more specifically that



such maps and plans shall show the Commission's recommendations for general location, character and extent of streets, alleys, ways, viaducts, bridges, waterways, waterfronts, subways, boulevards, parkways, parks, playgrounds, aviation fields and other public grounds, way or open spaces; the general location and the extent of public utilities and terminals whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power and other purposes; and the removal, relocation, widening, narrowing, vacating, abandonment, change of use, or extension of such public ways, grounds, open spaces, buildings, property, utilities or terminals.

The Commission shall further have the powers and duties concerning control, preservation and care of historical monuments, design and location of harbors, bridges, statuary, viaducts and street fixtures and other public structures.

The Commission shall have the power to employ clerks, engineers, draftsmen and such other subordinates as it shall deem necessary for the performance of its functions; the expense for which must be within the amounts appropriated by Council to cover the services of the Commission.

### Section 2. Members, Qualifications, Terms

The Planning Commission shall consist of the Mayor, the Service Director and three citizen members, holding no other municipal office. The Commission citizen members shall be appointed by the Mayor, subject to the confirmation of 2/3 vote of all the members elected to Council, and shall serve for a term of five (5) years, however, upon passage of the Charter, the then existing members

of the Planning Commission shall remain in office for the terms for which they were appointed. Any vacancy occuring in the Commission shall be filled for the unexpired portion of the term only and in the manner prescribed by this Charter for the original appointment. Any appointed citizen member of the Commission may be removed by the Mayor for cause, subject to the approval of 2/3 of all the members elected to Council, and upon complaint and a public hearing.

The Commission shall make its own rules and shall appoint a chairman and secretary. It shall keep a journal of its proceedings and its meetings shall be open to the public at all times.

### Section 3. Mandatory Referral

Any amendment to, or change in, the existing zoning laws of the City, originating with the Council, shall be submitted to the Planning Commission, which shall be allowed a reasonable time, not less than thirty days, for consideration and report to Council. After such consideration and report, Council shall hold a public hearing on such proposed amendment or change, giving not less than thirty days notice of the time and place thereof, in two newspapers of general circulation within the City; and during such thirty days the text or copy of such ordinance or measure, proposing such amendment or change, and all papers pertaining thereto and the report of the Planning Commission shall be on file with the Clerk of the Council for public examination. Copies of the proposed amendment or change shall also be displayed in five of the most public places within the City. If the Planning Commission shall disapprove of the proposed amendment or change, the procedure shall be the same



as enumerated above except that the Planning Commission or its representatives may also, during the aforesaid 30 day period of public notice, cause to be advertised in two newspapers of general circulation and posted in five of the most public places, a statement of not more than 300 words presenting the reasons for the refusal, at the City's expense.

### Section 4. Zoning Board of Appeals

There shall be a Zoning Board of Appeals consisting of five (5) citizen members, holding no other public office, appointed by the Mayor, subject to the confirmation of 2/3 of all the members elected to the Council, for terms of five years each. However, upon passage of this Charter, the then existing members of the Board of Appeals shall remain in office for the terms for which they were appointed. Any vacancy occuring other than by expiration of term, shall be filled for the unexpired portion of the term only and in the manner prescribed in this Charter, for the original appointment. The Board shall administer the details of the application of the zoning regulations, and shall hear and determine appeals from refusal of building permits by the Building Commissioner or other officer, may permit exceptions to and variations from the district regulation and shall have any and all other powers conferred upon it by ordinance or the general laws of the State of Ohio. The Board of Appeals may make its own rules and select its own chairman and secretary. It shall keep a journal of its proceedings and all of its meetings shall be open to the public.

The Zoning Board of Appeals citizen members shall be removed by the Mayor for cause, subject to the approval of 2/3 of all the members elected to Council, and upon complaint and a public hearing.

## ARTICLE IX

### Recreation Commission

### Section 1. General Provisions

The Council may provide, designate and set apart for public use as playgrounds, playfields, gymnasiums, swimming pools or indoor recreation centers, any lands or buildings, owned by the City, not dedicated or devoted to other municipal use and may acquire land or buildings or both, for such purpose in the manner provided by law.

### Section 2. Members, Terms and Duties

The Council may establish and provide for a City Recreation Commission with the authority and power to prepare, equip, operate and maintain such recreation facilities and employ supervisors, play leaders, recreation directors and such other employees as such Commission may deem necessary. Such Commission shall consist of five members and shall possess all powers and be subject to all the responsibilities prescribed by ordinance or general laws. The members of the Commission shall be appointed by the Mayor subject to the confirmation of 2/3 of all the members elected to the Council and shall serve for terms of five (5) years, or until their successors are appointed and qualified; provided, however, that the members of any Recreation Board of Commission at the time of the effective date of the Charter shall continue in office for the terms for which the members were appointed; and provided further that one member of the Commission may be a member of the school district in which the City is located. Members of such Commission shall serve without pay and vacancies on the Commission other than by expiration of term, shall be filled in the same manner as the original appointment and for the unexpired portion of the terms only.



Members of the Commission shall be removed by the Mayor for cause, subject to the approval of 2/3 of all the members elected to Council, and upon complaint and a public hearing.

### Section 3. Conduct of Meetings

The members of the City Recreation Commission, so established, shall elect their own chairman and secretary and select such other officers as they may deem necessary. The Commission shall have the power to adopt rules and regulations for the conduct of all business within its jurisdiction.

## ARTICLE X

### Fiscal Matters

### Section 1. Finances

The Director of Finance and the Mayor shall furnish a fiscal report of revenues, expenditures, and appropriation balances to each member of Council, in writing, not later than the 15th day of December of each year.

The Director of Finance and the Mayor shall also furnish to Council, not later than the second regular meeting of the month of January of each calendar year, an ordinance making appropriation for the expenditures of the Municipality during the year. Such ordinance shall be adopted by Council in its original form or with such revisions as it may find proper. Such appropriation ordinance shall be in such form and detail as may be required by the general laws of the State of Ohio, and may be amended or supplemented by Council after its passage, but appropriations shall not be made in excess of the estimated revenues of the Municipality. The

Council may make preliminary appropriations for current expenses sufficient in amount to meet the current needs until the annual appropriation ordinance has been enacted and is in effect.

The passage of an ordinance authorizing the issue or sales of bonds or notes of the Municipality shall constitute an appropriation of the proceeds thereof, to this purpose for which said bonds or notes are issued.

### Section 2. Transfers and Balances

The Council may transfer, during the current year, any part of an unincumbered balance of an appropriation to any other purpose or object for which the appropriation therefor, has proven insufficient, or may authorize a transfer of money to be made between items appropriated to the same office or department, except as follows:

(a) No transfer shall be made from any bond or note fund, except that the unincumbered or unexpended balance of such fund no longer needed for the purpose for which such fund was created, shall be transferred to the fund from which said bonds or notes are to be paid.

(b) No transfer shall be made of money raised or appropriated for the payment of any bond or note of the Municipality unless all indebtedness, interest and obligations, which can lawfully be paid from such money, have been paid.

At the close of each fiscal year, the unincumbered balance of each appropriation other than the appropriations of bond and note funds, shall revert to the fund from which it was appropriated and shall be subject to future appropriation, except otherwise provided in the next paragraph of this section.



A fund to be known as the Improvement Fund may be maintained in the Treasury into which municipal monies may be appropriated or allocated from time to time by action of Council, and which shall then become and remain separated and distinct from general funds. Improvement Fund monies may be advanced or expended from time to time by action of Council for public improvements not otherwise provided for.

### Section 3. Payment of Claims

No money shall be drawn from the Treasury, nor shall any obligation for the expenditure of money be incurred, except pursuant to appropriations made by Council.

The Director of Finance and/or the Mayor shall have the power to require evidence that the amount of each claim is justly due and is in conformity to law and municipal legislation relating thereto. For that purpose they may summon before them any officer, agent of any department, or employee of any department of the Municipality, and examine him under oath or affirmation relative thereto.

### Section 4. Custody and Deposit of Funds

The Council shall by ordinance provide for the custody of all funds of the Municipality and for the deposit of funds as provided by the Uniform Depository Act of the State of Ohio. All funds received on behalf of the Municipality by any officer, employee or agent thereof, shall be promptly paid over to the Director of Finance of the Municipality, and by him promptly placed in the depository bank. Council, however, may authorize such sums as it deems proper to be kept in cash for the daily operations of any department or office.

Inactive funds in the Treasury of the municipal depository may be invested from time to time in such manner as is now or hereafter may be authorized by the general laws of the State of Ohio for the investment of inactive funds of municipalities.

### Section 5. Certification of Expenditures

No contract, agreement, or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution, or order for the expenditure of money be passed, or issued, by Council, or be authorized by any officer of the Municipality unless the Director of Finance shall have certified in writing that the money required for such contract, agreement, obligation or expenditure is in the Treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose. The provisions of this section shall not be construed to prevent the making of contracts for a period extending beyond a single fiscal year, when such contracts are otherwise authorized by the Constitution of the State of Ohio, by this Charter, or by general laws of the State of Ohio. All monies actually in the Treasury to the credit of the fund from which they are to be drawn and all monies applicable to the payment of the obligation or appropriation involved that are anticipated to come into the Treasury before the maturity of such contract, agreement, or obligation from taxes, assessments, license fees or from the sales of service, products, or by-products of any Municipal undertaking, and monies derived from lawfully authorized bonds or notes shall for the purpose of certification be deemed to be in the Treasury to the credit of the appropriate fund, and shall be subject to such certification.



### Section 6. Public Bidding

No expenditure, other than the compensation of persons employed by the City, in excess of one thousand dollars ($1000.00) shall be made except pursuant to a contract made with the person, firm or corporation whom Council determines to be the lowest and best, responsible bidder, after public advertising and receipt of bids in the manner provided by the laws of the State of Ohio.

### Section 7. Franchises

The Council, by ordinance, may grant permission to any person, firm or corporation to construct and operate a public utility in, on, across, under or above any public street or ground within the Municipality. It may prescribe in the ordinance the kind and quality of service or product to be furnished, the rate or rates to be charged therefor, and any other terms conducive to the public interest. Such grant may by action of Council be amended or renewed in the manner and subject to the provisions established by this Charter for original grants. Such grant, amendment, or renewal, shall be for such period of time as Council may determine, and shall not be perpetual or exclusive.

No consent of the owner of property abutting on any public street or ground shall be necessary to the effectiveness of any grant, amendment, or renewal, unless the construction or operation of the public utility authorized thereby is of such character as to constitute an additional burden upon such public street or ground. All such grants, amendments or renewals shall be made subject to the continuing right of Council to provide reasonable regulations for the operation of such utilities with reference to such streets and public grounds, including the right to require such reconstruction, relocation or discontinuance of appliances,

plant or equipment used in such streets or public grounds as shall, in the opinion of Council, be necessary in the public interest.

### Section 8. Taxation and Finances

The laws of Ohio relating generally to taxes, budgets, appropriations, deposits, expenditures, debts, bonds, contracts and other fiscal matters of the Municipality shall be applicable to this City except as modified by, or necessarily inconsistent with, the provisions of this Charter.

## ARTICLE XI

## Miscellaneous

### Section 1. Military Service

Except as hereafter in this section provided, if a person holding an elective office in the Municipality shall be called into active military service during his elective term, his office shall thereupon become vacant, and it shall be filled as provided by this Charter. Membership in Military Reserve or State Militia shall not create a vacancy in office unless the office holder be called to full time military service for a period exceeding thirty (30) consecutive days.

### Section 2. Effect of Charter

All general laws of the State of Ohio as now or hereafter enacted which are not in conflict with this Charter, as now enacted or hereafter amended, or with any ordinance enacted hereunder shall apply to the government of the Municipality; and all ordinances, resolutions and by-laws in force in the Municipality at the time when this Charter takes effect which are not inconsistent with the provisions of this Charter shall continue in full force and effect until amended or repealed.



The taking effect of this Charter shall not affect any pre-existing rights of the Municipality, nor any right or liability or pending suit or provision either on behalf of or against the Municipality, nor any contract entered into by the Municipality, nor any franchise granted by the Municipality, nor pending proceedings for the authorization of public improvements or the levy of assessments therefor.

### Section 3. Words Held to be Inclusive

Masculine pronouns used in this Charter shall be construed to include the feminine pronoun, and the singular number shall be construed to include the plural number whenever the context shall require.

### Section 4. Partial Invalidity

The determination that any section or part thereof of this Charter is invalid, shall not invalidate nor impair the force or effect of any other section or part thereof, except to the extent that such other section or part thereof is dependent for its operation upon the part declared invalid; and in the event any section or sections or parts thereof shall be held invalid, then the laws of the State of Ohio pertaining to municipalities and dealing with the same subject matter shall apply.

### Section 5. Amendment to Charter

The Council may by a vote of at least 2/3 vote of all its members, submit to the electors of the Municipality amendments to this Charter; and, upon petition being presented to Council setting forth a proposed amendment, signed by not less than that number of resident and qualified electors of the Municipality which equal ten (10) percent of the number of qualified electors of the Municipality.

Such proposed amendment shall be submitted to the electors of the Municipality for adoption or rejection. The submission of a proposed amendment to the electors shall be governed by the provisions of the Constitution of the State of Ohio, and to such extent as the Constitution shall fail to provide therefor, the Council shall determine the manner of such submission. If any amendment so submitted is approved by a majority of the electors voting thereon, its provisions shall be incorporated into this Charter; except that if two or more inconsistent amendments on the same subject matter are submitted at the same election, only the one receiving the largest affirmative vote, not less than a majority, of the votes cast on the subject matter, shall become incorporated into this Charter.

### Section 6. Effective Date

For the purpose of electing officers and holding and conducting municipal elections, this Charter shall take effect at the next regular municipal election to be held the first Tuesday in November in the year 1955; except that those candidates filing for such public offices provided for in this Charter shall submit their petition of candidacy to the Board of Elections of Lake County, Ohio, ninety (90) days before the aforementioned date in compliance with Article II, Section 1, of this Charter. For all other purposes other than the election of municipal officers, this Charter shall take effect on the first day of January in the year 1954 upon its approval by the electors of the Municipality.

We, the undersigned, being a majority of the members of the Charter Commission of the City of Eastlake, have framed this Charter to be voted upon at the regular mu-



nicipal election to be held on the third day of November, 1953.

| | |
|---|---|
| John M. Barrett, Chairman | Joseph Pizzie |
| Earl Davis, Vice Chairman | Harry Roberts |
| Elsie DeJean | Thomas Shipley |
| Laurence Moss | Patrick Stillisano |
| Roland Baskin, Legal Counsellor | Helen Page, Secretary |

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## AMENDMENT TO THE CHARTER OF THE CITY OF EASTLAKE

(Adopted November 2, 1971)

### ARTICLE VIII

### City Planning Commission

### Section 3. Mandatory Referral

That any change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land and the selling or leasing or rental of parkways, playgrounds, or other city lands or real property, or for the widening, narrowing, re-locating, vacating, or changing the use of any public street, avenue, boulevard, or alley cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the city council

should approve any of the preceding changes, or enactments, whether or approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. Said issue shall be submitted to the electors of the City only after approval of a change of an existing land use by the Council for an applicant, and the applicant agrees to assume all costs of the election and post bond with the city Auditor in an amount estimated by the County Auditor or the Board of Elections proportionate with any other issues that may be on the ballot at the same time. The applicant shall further agree to authorize the City Auditor to advertise, and assume the obligations to pay, for a notice of the posted bond and the requested land use change in a newspaper of general circulations, whose circulation is either the largest, or second to the largest within the limits of the City for two consecutive times, with at least two weeks between notices and a third notice one week prior to the election. Should the land use request not be affirmed by a 55% favorable vote it cannot be presented again for one full year and a new request must be made at that time.

It shall be the duty of any applicant for a land use change to obtain zoning codes, maps, thoroughfare and sewer plans or advice of the city council and officials and approving bodies for interpretation of this section as they are always available. If this section is violated and a building is under construction or completely constructed it shall



be mandatory for the Mayor, Safety Director, Service Director and Building Inspector equally to have the building or structure removed completely within 60 days at the owners expense as these officials are charged with the enforcement of this section. It shall be mandatory that the City Council charge and fund the Planning Commission to have on display at all times in the council chambers and available to the public a zone map, showing a legend and summary of zoning regulations by district, Major use, Minimum and maximum lot width and that each district, city park, playground, and city lands be accurately located and identified with the date of adoption and the date of revisions to date. Any and all revisions will be posted to the zone map within 90 days of their occurrence. Maps shall be available to each land owner of the city for a nominal cost not to exceed $2.50 each on demand. Maps shall be available within six months of this charter change.

Supreme Court, U. S.
FILED
JUL 21 1975
MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

October Term, 1974
No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

## BRIEF OF RESPONDENT IN OPPOSITION

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# Supreme Court of the United States

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THE CITY OF EASTLAKE, *et al.*,
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vs.

FOREST CITY ENTERPRISES, INC.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF OF RESPONDENT IN OPPOSITION

### STATEMENT OF THE CASE AND QUESTION PRESENTED

While the facts as set forth by petitioners are embroidered with occasional conclusions and for that reason tend to be somewhat inaccurate, petitioners' Statement of the Case, particularly as amplified by the opinion of the Court below, is adequate for present purposes.

Petitioners' statement of the Questions Presented for Review is less acceptable. While the issues at stake may be gleaned by ignoring the conclusionary phraseology in the Questions posed by petitioners, the basic issue is more succinctly and accurately stated as follows:

Is an owner of land deprived of due process by a requirement that any change in use of his land, although duly authorized by all appropriate municipal administrative and legislative bodies, must, *as a precondition to effectiveness,* be first submitted by the landowner to the general electorate in a referendum and receive a 55% affirmative vote?

The Supreme Court of Ohio held that such a requirement violated Section 1f of Article II of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

Petitioners have advanced no creditable reason for a review of that determination.

## ARGUMENT

**1. This case does not present a federal question of substance for the reason that the decision of the Supreme Court of Ohio was based upon alternative state and federal grounds, either of which will support the decision.**

The decision[1] of the Supreme Court of Ohio was based upon two separate grounds. The first ground was set forth in paragraph one of the syllabus[2] of the Court as follows:

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1. The syllabus and opinion of the Supreme Court of Ohio are set forth in full at Appendix A to the Petition in this case. The case is officially reported as *Forest City Enterprises v. Eastlake,* 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

2. The syllabus in cases considered by the Supreme Court of Ohio is prepared by the Court and is the statement of the law upon which the decision was reached. See *Beck v. Ohio,* 379 U.S. 89, 93 n.2 (1964); *Cassidy v. Glossip,* 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).



1. Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are "authorized by law to control by legislative action." (Paragraph one of the syllabus in *Myers v. Schiering,* 27 Ohio St. 2d 11, approved and followed.)

In the body of the opinion, Mr. Justice Brown, writing for a majority of the Ohio Supreme Court, noted that while the power to zone or rezone through the passage or amendment of a comprehensive zoning ordinance is clearly a legislative function, "[g]rants of relief from unnecessary hardship . . . are classified as administrative acts, regardless of the label placed on them." 41 Ohio St. at 190, 324 N.E.2d at 743. Administrative acts were characterized as being those which execute or administer a zoning ordinance, rather than bringing one into existence. The opinion reaffirms the principle that, in Ohio, the power of referendum does not extend to administrative acts.[3]

Article VIII, Section 3 of the Eastlake Charter[4] sets forth that "any change" in existing land use or "any change whatsoever to any ordinance" or "the enactment of any ordinance" affecting the use of land is subject to the mandatory referendum procedure. All changes in land use thus fall within the requirement of a mandatory referendum regardless of whether they are classified as administrative or legislative. In encompassing administrative acts, this Charter provision is clearly invalid under Section 1f of Article II of the Ohio Constitution and was held to be so by the Supreme Court of Ohio in paragraph one of its syllabus.

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3. *Myers v. Schiering,* 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971).

4. The text of Article VIII, Section 3, of The Eastlake Charter is set forth in full at page 50 of Appendix D to the Petition in this case.

While the Supreme Court of Ohio then went further to consider the due process infirmities of the mandatory referendum requirement as applied to legislative acts, the Court could justifiably have stopped with its initial holding. The Charter provisions are clearly not separable so as to enable a Court to hold a part of them invalid, while saving the rest.[5] Thus, even without the federal due process ground, the provision of the Eastlake Charter for a mandatory referendum, with a 55% favorable vote required on every land use change, must necessarily fail in its entirety due to the limitations on referenda under the Ohio Constitution.

This Court has long held that where the judgment of a state court rests upon two independent grounds, one of which is federal and the other non-federal, there is no jurisdiction to review the state court judgment. *See, e.g., Jankovich v. Indiana Toll Road Comm'n.*, 379 U.S. 487 (1965). This is clearly such a case and for that reason the Petition for Writ of Certiorari should be denied.

**2. The Ohio court correctly applied established precedent of this Court in finding that the mandatory referendum procedure required by the Eastlake Charter was violative of the due process clause of the Fourteenth Amendment.**

Section 3 of Article VIII of the Eastlake Charter requires that all changes in existing land uses, whether through zoning or otherwise, as a condition to becoming effective, shall first be subjected to a referendum and shall receive from the general electorate a 55% affirmative vote of approval.

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5. If a challenged statute is not separable and a part of it is found to be unconstitutional, the statute must fail in its entirety. *Board of Election v. State*, 128 Ohio St. 273, 191 N.E. 115 (1934).



This Court has considered and held unconstitutional substantially similar legislation. *Eubank v. City of Richmond*, 226 U.S. 137 (1912), involved an ordinance which provided that upon request of two-thirds of the owners of property abutting any street, a building line would be established along the street. A landowner, whose dwelling violated a building line thus established, challenged the constitutionality of the ordinance on the ground that it embodied an unlawful delegation of legislative authority depriving the landowner of his property without due process. This Court agreed. It is constitutionally objectionable, the Court held, for one set of landowners to determine and control the use which another landowner might make of his property without providing appropriate standards by which the power is to be exercised. As the Court observed, "even so arbitrary a thing as taste" might control the decision. 226 U.S. at 144.

Similarly, in *Washington, ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), the trustee of a home for the aged sought to replace an existing building with an enlarged structure. A Seattle ordinance, amending the City's comprehensive zoning scheme, permitted the erection of the structure as contemplated, but made such approval subject to the trustee's obtaining the written consent of two-thirds of the adjacent landowners. The trustee was unable to obtain the required consents and challenged the validity of the ordinance. This Court held that the consent requirement constituted an unlawful delegation of legislative power.

Due process requires that use of property be controlled by a responsible legislative organ of government, and not the uncontrolled whim of a minority of electors; and the Supreme Court of Ohio so recognized in this case:

> Due process of law requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government. *McGautha v. California,* (1971) 402 U.S. 183, 256, 270. . . . 41 Ohio St. at 196, 324 N.E.2d at 746.

Applying the principles of these cases, the Supreme Court of Ohio found that under the mandatory referendum procedures of the Eastlake Charter, zoning policies would not be "articulated" by a responsible organ of government but were left to the unfettered whim of a minority of the voters. There is no substantial distinction between this case and the procedure condemned in *Eubank* and *Roberge.*[6] In this instance 46% of the electors, acting not as a legislative body constituted in an open meeting but anonymously and unguided by any standards, may thwart the reasoned decision of the elected legislators made in light of the overall zoning plan. Clearly this is an unconstitutional delegation of legislative authority violative of the due process clause of the Fourteenth Amendment.

Nor, as petitioners urge, does *James v. Valtierra,* 402 U.S. 137 (1971), require a different result. *Valtierra,* as the Ohio Supreme Court noted, did not concern zoning, but rather the development, construction or acquisition of low-rent housing by public bodies. The California Supreme Court had earlier held that the actions of local housing

6. See also, *Schulte v. Garnett,* 186 Kan. 117, 348 P.2d 629 (1960); *In re Hetrick's Appeal,* 391 Pa. 148, 137 A.2d 310 (1958).



authorities, established to take advantage of federal financing for low-rent housing, were not subject to the California Constitution's referendum provisions. Within six months the California Constitution was amended to provide that no low-rent housing project might be developed, constructed or acquired by any public body until the project had been approved at a referendum election.

Citizens claiming they qualified for low-rent housing challenged the referendum requirement on the basis that it effectively deprived them of low-rent housing and was therefore violative of the Supremacy Clause, the Privileges and Immunities Clause and the Equal Protection Clause. There was no due process claim at issue. In upholding the referendum requirement Mr. Justice Black, speaking for this Court, drew the distinction critical to an understanding of *Valtierra*:

> [Referendum approval of low-rent public housing projects] ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. . . . 402 U.S. 137, 143.

There is no comparison between the issues presented in *Valtierra* and those presented in this case. In *Valtierra* there was no denial of due process to a specific property owner, but rather a claimed denial of equal protection to an undefined group.

Moreover, the issues made subject to referendum in *Valtierra* clearly related to public policies which would surely impact the entire community by reason of the expenditure of public funds and the lowering of tax revenues. In the present case, on the other hand, all land use decisions, no matter how insignificant or lacking in com-

munity-wide interest, must be presented to the community at large and be approved by 55% of the voting electorate. Such land use decisions, while directly and immediately affecting the particular property owner involved, invoke no basis for community-wide policy making.

It was for these reasons that the Supreme Court of Ohio recognized *Valtierra* as inapplicable and *Eubank* and *Roberge* as controlling on the due process issue.

**3. The Decision of the Supreme Court of Ohio is in accord with other constitutional principles.**

Since 1926 when this Court decided *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), it has been indisputable that zoning is an appropriate expression of the police power. Underlying such impingements on an individual's free use of his property, however, are the concomitant constitutional principles that restrictive zoning provisions must bear a substantial relation to *public* health, safety, morals or general welfare *and* that they not be clearly arbitrary and unreasonable.

These constitutional principles play no part in the decision making process under the Eastlake Charter. Any zoning change—no matter how insignificant (or meaningful) to the community at large; no matter how intimately related to the community's comprehensive zoning plan; no matter how thoroughly and expertly considered by the municipal planning commission and adopted, even unanimously, by the legislative council—such an approved change is *wholly ineffective* unless and until the individual property owner places the issue of his zoning change on the ballot and obtains a 55% vote of approval.

Or, stated obversely, a 46% minority of those who happen to vote can frustrate a change in use which has



been fully validated by the city's planning and legislative process; and this unidentifiable minority may do so without the restraint of public duty or accountability to any authority, on the basis of mere whim or caprice, and without the benefit of experience, of knowledge of the facts or of exposure to proper standards for judgment.

"In what way", as this Court said in *Eubank*, "is the public safety, convenience or welfare served by conferring such power?" 226 U.S. at 143. This is not "democracy", as petitioners so blithely aver, but anarchy; and it strikes at every constitutional principle for the exercise of police power which undergirded the original decision in *Euclid v. Ambler*.

What then is the true meaning and objective of this Eastlake Charter provision?

Justice Stern, in his concurring opinion below, put his finger on the real issue: This so-called referendum procedure is intended

> . . . to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. . . .
>
> There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.
>
> . . . .
>
> Zoning provisions such as that in Eastlake's Charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas. . . . 41 Ohio St. at 199, 200, 324 N.E.2d at 748, 749.

And there is no denying the awesome truth of these insights for petitioner concedes that no less than seventeen

outlying communities have ringed Cleveland and its mature suburbs with Eastlake type restrictions—a veritable choke collar against change in the large lot, single family, residential use predominating in these restrictive communities.

Planning for community land use is a complex and important task. The desires of a suburban community to be free from what it may feel are undesirable land uses must be balanced against the needs of the wider geographical area for multiple types of housing and commercial uses. Change, not stagnation, is the signal characteristic of our society; and comprehensive land use plans which fail to provide adequately for various types of land uses are increasingly being struck down by the courts.[7]

Against the requirement for comprehensive planning is set the Eastlake mandatory referendum procedure by which the electorate may reject, for whatever reason or no reason, any changes, including those necessary to preserve the constitutional validity of the zoning ordinance. There is no practicable remedy other than the Constitution left to a landowner aggrieved by such a pseudo referendum provision.

In view of these burdens, unrelated as they are to police power standards, Eastlake's mandatory referendum procedure cannot be said to be founded on "neutral" principles, as petitioners urge, but rather it embodies a systematic infringement on the property rights of those landowners seeking to make a better, and perhaps constitutionally mandated, use of their land. Eastlake's Charter provision is thus impermissible under *Euclid v. Ambler* and its multitude of progeny.

---

7. *See e.g., Southern Burlington City N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).



## CONCLUSION

No matter how viewed—whether as based on alternative state and federal grounds or as applying with fidelity the established precedent of this Court—the judgment of the Supreme Court of Ohio which struck down Eastlake's innovative attempt to preclude land use change is not deserving of further review by this Court.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# Supreme Court of the United States

October Term, 1974
No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*
vs.
FOREST CITY ENTERPRISES, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF FOR PETITIONERS

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# Supreme Court of the United States

**October Term, 1974**
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THE CITY OF EASTLAKE, *et al.*,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF FOR PETITIONERS

## OPINIONS BELOW

The Opinion of the Supreme Court of Ohio is reported at 41 Ohio St. 2d 187, 324 N.E.2d 740 and is printed in the Appendix to the Petition for Certiorari, at page 13. The Opinions of the Eleventh District Court of Appeals of Lake County and the Court of Common Pleas, which are not reported, are printed in the Single Appendix at pages 23 and 19 respectively.

## STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 19, 1975. A timely filed Petition for Re-hearing was denied on April 17, 1975. The Petition for Certiorari was filed on June 12, 1975, and granted on October 14, 1975. Jurisdiction to review the judgment by Writ of Certiorari is conferred on this Court by Title 28, United States Code, Section 1257(3).

## CONSTITUTIONAL AND CITY CHARTER PROVISIONS INVOLVED

**United States Constitution, Fourteenth Amendment:**

"§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**Charter of the City of Eastlake:**

Article VIII—Section 3 of the Charter of the City of Eastlake provides in pertinent part, "That any change to the existing land uses * * * cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the City Council should approve any of the preceding changes, or enactments, whether approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. Said issue shall be submitted to the electors of the City only after approval of a change of an existing land use by the Council for an application, and * * *."[1]



## QUESTION PRESENTED

Whether the automatic and mandatory referendum voting procedure provided for by the Eastlake City Charter, requiring that any ordinance rezoning land use must first be approved by a 55% majority of the voters in a city-wide election at a general or special election prior to becoming finally effective, is in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

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1. For full text of pertinent Eastlake Charter provisions, see (A. 30); for full text of Charter Amendment, see (A. 69).

NOTE: "A." refers to the page number of items reprinted in the Single Appendix. "Pet." refers to page numbers of the opinion of the Ohio Supreme Court which is appended to the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

### A. Factual Background

On May 8, 1971, Respondent, Forest City Enterprises, Inc., an Ohio Corporation, applied to the City of Eastlake for rezoning of an eight (8) acre parcel of land from industrial to multi-family high rise use classification.

The application of respondent was processed and approved by the City Planning Commission and on December 28, 1971, the Council of the City of Eastlake enacted Ordinance No. 1971-168, which provided for the requested change in zoning classification for the property in question.

In the interim, an amendment to the Eastlake City Charter was proposed by initiative petition, which provided that no ordinance providing for change in land use in the City of Eastlake would become finally effective unless and until approved by a 55% majority vote in a city-wide referendum election, which amendment was adopted at a general election on November 2, 1971.

Thereafter, in May, 1972, an election was held and the Ordinance providing for the rezoning of respondent's property failed to obtain the requisite 55% affirmative majority of the votes cast.

### B. Proceedings Below

Respondent then filed for declaratory judgment and injunctive relief in the Court of Common Pleas of Lake County, Ohio, claiming the mandatory referendum voting procedure required by Article VIII, Section 3 of the Charter of the City of Eastlake, in respect to land change use, was unconstitutional as it denied respondent due process of



law under the Ohio and United States Constitution, and violated the referendum provisions of the Ohio Constitution.

The case was submitted to the trial court upon the complaint and answer, with stipulations of counsel as to the applicability of certain ordinances of the City of Eastlake and the Eastlake Charter.[2] No evidence was introduced by either side.

The decision of the Court of Common Pleas (A. 19), which found the mandatory referendum voting provisions of the Eastlake Charter in respect to land use change did not violate respondent's constitutional rights, was later sustained by the Eleventh Appellate District Court of Appeals of Lake County, Ohio (A. 23).

Thereafter, respondent perfected appeal to the Supreme Court of Ohio, and the majority of the Court[3] in its Decision of reversal, found that a reasonable use of property by rezoning may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public, without violating due process of law under the Federal Constitution (Pet. 23, 24).

On October 14, 1975, this Court granted petitioners' Writ for Certiorari to review the Decision of the Ohio Court below to determine the question presented, to wit:

> Whether the mandatory referendum voting procedure of the Eastlake Charter, for rezoning land use, constitutes an unlawful delegation of legislative power to the electorate in violation of the Fourteenth Amendment to the United States Constitution.

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2. See transcript of Proceedings (A. 15-18).

3. Five Justices joined in the majority Opinion (Pet. 13); four joined in the concurrence (Pet. 27) and two joined in the dissent (Pet. 30).

## SUMMARY OF ARGUMENT

### I

The Decision of the Ohio Supreme Court below, that the referendum voting procedure for rezoning provided for by the Eastlake Charter, constitutes unlawful delegation of legislative power and violates due process of law under the Federal Constitution, relied upon and wrongfully interprets decisions of this Court in *Washington v. Roberge*, 278 U.S. 116 (1928), *Eubank v. Richmond*, 226 U.S. 137 (1912), and *Cusack v. Chicago*, 242 U.S. 526 (1917). The procedural standards and safeguards to which reference is made in those cases have no application where submission of the issue is made by referendum to the electorate as a whole. Such mandatory referendum procedure does not constitute an arbitrary or unreasonable exercise of the police power and is a valid means whereby the voters themselves may exercise their traditional right to override the views of their elected representatives as to what best serves the public interest and give the electorate a voice in decisions that will affect the future development of their own community.

### II

The zoning restrictions placed upon respondents' property were not claimed or found to be unreasonable. The procedures by which land use restrictions are sought to be imposed in the first instance are political in nature and entrusted to local control under the political powers and the final decision, if reasonable, does not take property without due process of law. *Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926).



### III

The rezoning of respondents' property, under the substantive law of the State of Ohio, is a legislative function and, as such, subject to the referendum process. The mandatory zoning referendum procedure provided for by the Eastlake Charter is not in conflict with the referendum provisions of the Ohio Constitution or general laws.

### IV

The precedents of this Court established in *James v. Valtierra*, 402 U.S. 137 (1971) control in the instant case. In each case, the approval or disapproval of multi-family housing by the electorate of a community as a whole, is a condition to passage of enabling legislation. The mandatory referendum procedure in each instance was the same.

Like arguments were made in each case that the California Constitutional provision and the Eastlake Charter provision, though seemingly neutral on their face, were in fact aimed at discrimination against racial and economic minorities. This Court in *Valtierra*, after focusing on the history of California, as to the use of referendums, which is equally applicable to Ohio, found such provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice, and such procedure for democratic decision making by the electorate does not violate the Federal Constitution.

### V

Referendum powers are reserved to the people under the Ohio Constitution and in furtherance of such powers, the people of City of Eastlake, by express charter provisions, have reserved unto themselves, the right of refer-

endum over the legislative acts of their elected counsel. The finding of the Court below that the referendum procedure provided for by the Eastlake Charter for changing land use constitutes unlawful delegation of legislative power to the people is in contravention of the express provisions of the Ohio Constitution.

**VI**

Submission of zoning decisions to electors by referendum, both mandatory and by petition, is not an innovative concept in Ohio. No meaningful distinction may be made between the constitutionality of referendum zoning procedure in rural townships and counties from that in urban municipal communities as the Ohio Supreme Court has done by its decision in the present case.

**VII**

The 55% voter approval requirement of Article VIII, Section 3 of the Eastlake Charter does not stand as an impediment to its validity as other similar restrictive requirements are found in Ohio law. Article XI, Section 4 of the Eastlake Charter, a saving clause, would apply in the event the Court found any section or part of Amended Article VIII, Section 3 of the Eastlake Charter to be invalid for any reason.



## ARGUMENT

### I. THE DECISION BELOW RELIES UPON AND WRONGLY INTERPRETS DECISIONS OF THIS COURT IN WASHINGTON v. ROBERGE, 278 U.S. 116 (1928), EUBANK v. RICHMOND, 226 U.S. 137 (1912) AND CUSACK v. CHICAGO, 242 U.S. 526 (1917).

The Ohio Supreme Court below reversed the decisions of the trial court and the Court of Appeals based upon its analysis of decisions of this Court in *Washington, ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) and *Eubank v. City of Richmond*, 226 U.S. 137 (1912) and distinction of *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917). The resultant holding of the Court that a reasonable use of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public (Pet. 23),[4] misinterprets such decision of this Court.

In *Eubank*, where building line restrictions were sought to be imposed by neighborhood preference, it was held the exercise of such power could not be delegated to the potentially arbitrary discretion of the narrow interests of any segment of the public. This concept was further advanced in *Roberge* where a requested zoning change for a philanthropic home was subjected to the consent of the owners of the property within 400 feet of the subject property. Such delegation was deemed unlawful as denial of due process.

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4. The Delaware case of *Myers v. Fortunato*, 12 Del. Ch. 374, 375 (1920) cited by The Ohio Supreme Court does not support the conclusion of the Court on its facts as the *Myers* case, similar to *Cusack*, required a consent vote of adjoining property owners, not the electorate as a whole.

The foregoing decisions are distinguishable from the instant case where the referendum ordinance is submitted to the electorate as a whole. Reliance was made on the same cases in *Southern Alameda Spanish Speaking Organization v. Union City* (9th Cir. 1970) 424 F.2d 291, where a city-wide referendum nullifying a zoning ordinance to rezone certain property was upheld.

There, as in the instant case, the contention was made that the referendum process destroys the necessary procedural safeguards upon which a municipality's power to zone is based and subjects zoning decisions to the bias, caprice, and self interest of the voters.

In rejecting such contention, the Court in *Alameda* found reliance on *Roberge* and *Eubank* to be misplaced as the procedural safeguards, to which reference is made in those cases, have no application where the voting is submitted to the electorate as a whole.

In finding the referendum zoning process did not violate due process requirements, the Court in *Alameda* stated:

> "A referendum, however, is far more than an expression of an ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest. See *Spaulding v. Blair,* 403 F. 2d 862 (4th Cir. 1968)
>
> "Nor can it be said that the resulting legislation on its face was so unrelated to acceptable public interest standards as to constitute an arbitrary or unreasonable exercise of the police power." See *Washington, ex rel. Seattle Trust Co. v. Roberge, supra; Eubank v. Richmond, supra; Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926)
>
> * * *
>
> "Thus in the present case, neither the zoning process itself nor the result can be said to be such an arbitrary or unreasonable exercise of the zoning power as to be violative of appellant's right to due process of law * * *" (Cited in the Eastlake minority opinion at Pet. 34, 35.)



**A. The Zoning Restrictions Imposed on Respondent's Property Are Reasonable.**

The Court below further relied upon *Thomas Cusack Co. v. Chicago,* 242 U.S. 526 (1917) for its finding that a *reasonable use* of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public. In *Cusack* in which a majority of property owners' consent was required for erection of billboards in a residential area, this Court specifically looked to the reasonableness of the use proposed and held the consent ordinance to be constitutional.

In the instant case, respondent did not claim, and the Court below did not determine,[5] that the land use restrictions, as applied to respondent's particular property, were in any manner unreasonable. Nor could respondent so claim as the restrictions imposed upon respondent's property were the same from the time of enactment of the original Eastlake comprehensive zoning plan to the present and the ownership of such property by respondent was with

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5. The Ohio Supreme Court, in its majority Opinion, stated: "Whether the zoning of Appellant's property for industrial use is reasonable * * * we do not decide." (Pet. 26)

full knowledge of the zoning restrictions so imposed. Respondent can now only complain that it is being denied an economic advantage, to which it claims to be entitled, by virtue of failure of the requested rezoning to survive a referendum vote of the community.

### B. Local Political Land Use Decisions Should Not Be Impeded or Prevented by a Court Unless Unreasonable or in Violation of Law.

Land use decisions, in the first instance, are political in nature and entrusted to local control under the political powers and if reasonable, do not take property without due process of law. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). As further decided in *Ambler Realty*, it is only after the final political decision has been made[6] (be it by municipal council or final referendum vote of the electorate) and the restrictions imposed are unreasonable, arbitrary, or confiscatory, that a court challenge may be made on a specific fact basis in each case.

The legislative process established by the Eastlake Charter was the means by which the City of Eastlake elected to make its political decision in the first instance as to whether respondent's property would be rezoned to the requested high-rise use classification. Such decision, and the procedure by which it is made, is of purely local concern[7] and should not be impeded or prevented by a

6. The decision below places in jeopardy the right and power of the people to decide *before* the fact on important legislative decisions of social and economic concern to the community as a whole.

7. The sovereignty of a state rests in its people. The manner in which they distribute or parcel out its exercise is not a federal justiciable question. *Highland Farms Dairy v. Agnew*, 300 U.S. 608. Referendum, which is part of the state's legislative process, being founded on neutral principles, should be exempt from Federal Constitutional restraints. *Ranjol v. Lansing*, 417 F.2d 321, 324, *cert. den.* 397 U.S. 980 (1969).



Court except where it is made to appear that such final local decision is unreasonable or in violation of the law.

> "Referendum procedure provided by city charter, being an exercise of legislative power by the electors, should not be impeded or prevented by a court except where it is made to appear that the proceeding is inapplicable under the law or is in violation of the law." *City of Coral Gables v. Carmichael*, Fla., 256 So. 2d 404. Headnote 7.

The final political decision of the City of Eastlake in respect to rezoning of respondent's property through its mandatory referendum procedure, as provided by the City Charter, was not demonstrated to be unreasonable or in violation of law.

## II. THE POWER TO CHANGE OR AMEND A ZONING ORDINANCE IS A LEGISLATIVE FUNCTION UNDER THE SUBSTANTIVE LAW OF OHIO AND SUBJECT TO REFERENDUM.

As stated by the Ohio Supreme Court in its majority decision,[8] in Ohio, the power to zone or rezone, via the passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function and, as such, subject to the referendum process.

8. "In Ohio, the power to zone or rezone, via the passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function. *Berg v. Struthers*, 176 Ohio St. 146 (1964); *Tuber v. Perkins*, 6 Ohio St. 2d 155 (1966); *Donnelly v. Fairview Park*, 13 Ohio St. 2d 1 (1968); see also Justice Corrigan's concurrence in *Mobil Oil Corp. v. Rocky River*, 38 Ohio St. 2d 23, 31 (1974). As such, the zoning or rezoning of property is subject to the referendum process. *Hilltop Realty v. South Euclid*, 110 Ohio App. 535 (1960)" (Pet. 16).

Article III, Section 1 of the Eastlake Charter[9] provides that all ordinances and other measures adopted by the City Council shall be subject to referendum to the extent and in the manner provided by Charter or the Laws of Ohio.

No contention has been made by respondent that the requested rezoning of its property from industrial to multi-family high-rise use is other than a legislative act and as such, subject to referendum under the laws of the State of Ohio. Actually, respondent's very narrow claim, throughout these proceedings, is entitlement to a procedure whereby the electorate circulate a referendum petition for signature by 10% of the electorate, and that without such procedural safeguard there is no due process of law.[10] It is the automatic and mandatory referendum procedure provided by the Eastlake Charter to which respondent objects.

While the general laws of the State of Ohio provide for a general referendum procedure based upon a 10% petition basis, the Ohio Revised Code, Section 731.41,[11] specifically provides that such procedure does not apply to a municipality which adopts its own charter containing an initiative and referendum provision.

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9. "Ordinances and other measures may be proposed by initiative petition and adopted by elections, and other measures adopted by the council shall be subject to referendum, to the extent and in the manner now or hereafter provided by the Charter or the laws of Ohio." Eastlake Charter, Article III, Section 1 (A. 35).

10. As stated by the Ohio Supreme Court below: "Rather, (Respondent) Appellant's narrow claim is that Eastlake's Charter provisions constitutes delegation of legislative power to the people and *as such* violates the requirement that the police powers be exercised in a reasonable and unarbitrary fashion" (Pet. 18).

11. Ohio Revised Code Section 731.41: "Sections 731.29 to 731.41, inclusive of the Revised Code do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures."



The Ohio Supreme Court has also determined that a municipal charter is not restricted to the same provisions for referendum as enacted by the General Assembly.

> "In providing for referendum, however, a municipal charter is not restricted to the adoption of the same provisions enacted by the General Assembly. It may be less restrictive as to use of the referendum, as was the Charter of the city of Toledo which authorized referendum on all ordinances, including one levying a tax passed as an emergency measure. *State ex rel. Snyder v. Bd. of Education* (1946), 78 Ohio App. 194. It may be more restrictive, as in *Dillon v. Cleveland*, supra (117 Ohio St. 258), where a referendum would have been required under state law, but was not required under the provisions of the Charter of the city of Cleveland." (*State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St. 2d 147, 150.)

It is clear from an analysis of the substantive and procedural law of Ohio that the mandatory zoning referendum procedure provided for by the Eastlake Charter was not in conflict with referendum provisions of the Ohio Constitution as contended by respondent; nor did the court below so find.

## III. THE PRECEDENTS ESTABLISHED IN JAMES v. VALTIERRA, 402 U.S. 137 (1971) CONTROL IN THIS CASE.

At issue in *James v. Valtierra*, 402 U.S. 137 (1971) was the constitutionality of Article 34 of the California Constitution which provided for a mandatory referendum of approval prior to construction of any low rent housing project in any community. The mandatory referendum

requirement of the California Constitution was upheld by this Court[12] as an appropriate exercise of democratic decision making.

The majority of the Court below distinguished *Valtierra* on the assertion the California case did not concern zoning, rather approval or disapproval of low rent housing, and involved a decision which may lead to large expenditure of local government funds for increased public services and to lower tax revenues. No such meaningful distinction may be made from *Valtierra* as the change sought in the present case—multi-family high-rise—would have much the same effect as low-rent public housing and consequently the interest of the community as a whole may be equally at issue. The expenditure of public funds and tax results may be the same in either instance.

The referendum procedures required by the California Constitution and the Eastlake Charter are nearly parallel as applied to any given community. In each case, mandatory referendum voter approval is required as a condition to the enabling legislation becoming finally effective.

In the *Valtierra* case, as in the present case, like arguments were advanced that the automatic referendum procedure was unconstitutional as such procedure demands a mandatory referendum while many other referendums only take place upon citizen initiative. In rejecting such contention, Justice Black, in the majority Opinion stated:

> "This procedure ensures that all the people of a community will have a voice in a decision which may lead

12. Other lower courts have applied the principles set forth in *Valtierra* to referendums amending comprehensive zoning ordinances. See *Dwyer v. City Council of Berkeley*, 200 Cal. 505 and *City of Coral Gables v. Carmichael*, 256 So. 2d 404.



> to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision making does not violate that no state shall deny to any person 'the equal protection of the laws.'" (*James v. Valtierra, supra.*)

In further conformity with the *Valtierra* case, where this Court found that California's Article XXXIV did not rest upon "distinctions based on race", it cannot be said that Article VIII, Section 3, of the Eastlake Charter is discriminatory. Respondent made no challenge,[13] and there is no record to indicate, that the Eastlake Charter provision, neutral on its face, discriminates against racial or economic minorities.[14]

While Justice Stern, in his concurring Opinion in the present case, found the procedure established by the Eastlake Charter to have but a single motive, "and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas" (Pet. 29), such finding is not supported by the pleadings or the record in this case.

Certainly the history of Ohio demonstrates devotion to the use of referendums to give citizens a voice on ques-

13. Respondent, in its initial brief in the Court of Common Pleas, stated that it does not challenge the Eastlake Charter provision on any basis dealing with discrimination, intent, effect, or express provision against racial or economic minorities. Thereafter, racial or economic discrimination was not briefed by Petitioners or Respondent as an issue in the case.

14. Claim of discrimination and that the Eastlake Charter provision interfered with "National Housing policies" and "Constitutional rights of travel" were brought into the case for the first time in an Amicus Curiae Brief filed by "Lawyers for Housing" in the Ohio Supreme Court.

tions of public policy equal to that of California and of equal occurrence in the State's political life.[15] Equally applicable to the Eastlake Charter is the finding of the court in the *Valtierra* case that:

> "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."

No meaningful distinctions may be made between the subject matter and procedures required by Article XXXIV of the California Constitution and Article VIII, Section 3, of the Eastlake Charter. Equally applicable in each case is the finding of this court set forth in Headnote 4(2) of *Valtierra*

> "the referendum is a democratic decision-making procedure which, by insuring that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues, gives them a voice in decisions that will affect the future development of their community."

The principles established by the court in *Valtierra* are fully applicable and control in the instant case.

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15. Ohio legislatures and courts have long approved referendums and referendum type procedures which readily fulfill the standards of *Valtierra*.

Under the 1802 Ohio Constitution, the calling of a constitutional convention to make amendments required a majority of the popular vote (Ohio Constitution Article VII, Section 5 (1892)); the 1851 Ohio Constitution was adopted by referendum, and any Ohio Constitutional Amendments must be approved by public vote (Ohio Constitution Schedule 17 (1851)); and in 1912 adopted the initiative and referendum provision (Ohio Constitution Article II, Section 1 (1912)). In addition any proposal to alter Ohio County boundary lines *must* receive referendum approval (Ohio Constitution, Article XVIII, Section 8) and the creation of a municipal charter commission or the adoption of a charter both require referendum approval by the electors of the municipality (Ohio Constitution, Article XVIII, Section 8).



## IV. THE EXERCISE OF REFERENDUM POWERS RESERVED TO THE PEOPLE DOES NOT CONSTITUTE UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

The Court below in its finding that the referendum procedure of the Eastlake Charter for changing land use "constitutes unlawful delegation of legislative power in violation of the due process clause of the Fourteenth Amendment to the United States Constitution" is in apparent contravention of the express language of the Ohio Constitution.

Article I, Section 2 of the Ohio Constitution, states:

> "All political power is inherent in the people, government is instituted for their equal protection and benefit". Article II, Section 1f further provides: "The initiative and referendum powers are hereby *reserved* to the people of each municipality * * *" (Emphasis supplied)

Eastlake adopted a charter under Article XVIII of the Ohio Constitution, specifically Section 3, which provides: "Municipalities shall have authority to exercise all powers of local self-government" and Section 7, which provides for adoption of a city charter and to "exercise thereunder all powers of local self-government."

The Charter of the City of Eastlake, in conformity with Ohio Constitutional provisions, retained all powers of local self-government[16] except as limited by the Char-

---

16. "We the people of the City of Eastlake * * * do hereby adopt this Charter for the government of the City of Eastlake in order to secure the benefits of municipal home rule and to exercise all the powers of local self government under the Constitution and the Laws of the State of Ohio." Article I, Preamble (A. 32, 33). "The municipality shall have all the powers of local self-government now or hereafter granted to the municipalities by the Constitution of the State of Ohio * * * and all such powers shall be exercised in the manner prescribed by this Charter * * *" Article I, Section 2 (A. 33).

ter, were vested in council,[17] (Article V, Section 1), and further provided that ordinances and other measures adopted by the City Council "shall be subject to referendum[18]. It is of significance to note that zoning ordinances passed by the Eastlake Council, even under the original City Charter provisions, were never exempted from referendum. The only change by the Charter amendment was the referendum procedure by which the zoning issue would be submitted to a vote of the electorate.[19]

It is difficult to reconcile the finding of the Ohio Supreme Court that there was unconstitutional *delegation* of legislative power from council to the voting public where such power was reserved to the people in the first instance. The referendum powers are inherent in the people under the Ohio Constitution[20] and in furtherance of such powers,

17. "All the legislative powers of the City of Eastlake, *except as limited by the Charter and the Constitution of Ohio,* shall be vested in a Council of seven (7) members * * *" Article V, Section 1 (A. 40) (emphasis supplied). "All legislative action, shall be by ordinance or resolution * * *" Article V, Section 1D (A. 40).

18. "* * * Ordinances and other measures adopted by council *shall be subject to referendum in the manner now or hereafter provided by this Charter* or the laws of Ohio" (emphasis supplied) Article III, Section 1 (A. 35).

"All general laws of the State of Ohio * * * which are not in conflict with this Charter as now enacted or hereafter amended * * * shall apply to the government of the municipality * * *" (emphasis supplied) Article XI, Section 2 (A. 62).

19. "That any change to existing land use * * * or the enactment of any ordinance * * * controlling the development of land * * * shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote cast at the next regular municipal election, * * * otherwise at a special election * * *. Said issue shall be submitted to the electors of the City only after approval of a change in existing land use by the Council * * *" Amended Article VIII, Section 3 (A. 69).

20. "§1f [Power of municipalities.]

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."



the people of the City of Eastlake, by express charter provisions, have reserved the right of referendum over all ordinances adopted by its council.

Of equal application is the reasoning of the Ohio Supreme Court in *State ex rel. v. Hildebrant,* 94 Ohio St. 154, 161 (1916), in which an apportionment and redistricting act was annulled by referendum under the Ohio Constitution. In analyzing the sections of the Ohio Constitution which grant legislative power to the State Senate and House of Representatives, the Court states:

> "* * * the people of Ohio have by the aforesaid provisions of their constitution determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the 'referendum' ".
>
> "* * * The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed." (*State ex rel. Hildebrant, supra*)

The power of the people, acting within their constitutional rights, being supreme to the legislative acts of the council elected by the people, have the power to restrict the decision making power of the council in a way to share it with the voters of the local public entity.

It cannot be said that the exercise of such reserved powers by the voters of the City of Eastlake by mandatory referendum in rezoning of land constituted unconstitutional delegation of legislative power as determined by the Court below.

## V. REFERENDUM VOTE ON ZONING IS NOT AN INNOVATIVE CONCEPT IN OHIO.

Submission of zoning resolutions to electors by referendum, both mandatory and by petition, is not an innovative concept in the State of Ohio. Ohio Revised Code Sections 303.11[21] and 519.11 provide for submissions of zoning regulations adopted by County Commissioners and Township Trustees to the electors residing in the unincorporated areas of the county or township included in the proposed plan of zoning for their approval or rejection. In each instance, the zoning regulations became effective only if a majority of votes cast on the issue is in favor of the proposed plan.

Ohio Revised Code Sections 303.12[22] and 519.12[23] provide for referendum vote on amendments or supplements to county and township zoning resolutions.

The Ohio Supreme Court, in deciding as to the constitutionality of Ohio Revised Code Section 519.12, stated:

---

21. "If the zoning resolution is adopted by the board of county commissioners, such board shall cause the question of whether or not the proposed plan of zoning shall be put into effect to be submitted to the electors residing in the unincorporated area of the county included in the proposed plan of zoning for their approval or rejection at the next primary or general election, or a special election may be called for this purpose." (Ohio Revised Code Sec. 303.11).

22. "Amendments * * * may be made * * * without submitting them to a vote of the electors unless within 30 days after the adoption of the amendment * * * there is presented to the board of county commissioners a petition signed by a number of qualified voters and equal to not less than eight percent of the total vote cast * * * requesting the board to submit the amendment * * * for approval or rejection at the next primary or general election * * *" (Ohio Revised Code Sec. 303.12).

23. Similar wording is found in Ohio Revised Code Sections 519.11 and 519.12 for adoption and amendment of a zoning code by township trustees in unincorporated areas of townships.



> "What the General Assembly has done in Section 519.12, Revised Code, is to provide the people of the several townships with a power to veto, by use of the device of referendum, zoning resolutions passed by township trustees."
>
> "We find no constitutional impediments to a grant of legislative power by the General Assembly to township trustees to make zoning resolutions, nor for the General Assembly to reserve the power of referendum to the people who will be affected by such resolutions. Therefore, Section 519.12, Revised Code, insofar as it accomplishes these purposes of the General Assembly is constitutional." *Cook-Johnson Realty Co. v. Bertolini*, 15 Ohio St. 2d 195, 200, 201.

No meaningful distinction can be made between the rural voting community, where the constitutional validity of referendum voting on zoning amendments was upheld in counties and townships, from that in urban municipalities as the Ohio Supreme Court has done by its decision in the instant case. Such inconsistency is apparent on its face.

## VI. THE 55 PERCENT VOTER APPROVAL REQUIREMENT OF ARTICLE VIII, SECTION 3 OF THE CHARTER DOES NOT AFFECT ITS VALIDITY.

The contention of respondent that the Eastlake Charter requirement of a 55 percent voter approval, instead of a bare majority, affected the constitutional validity of the referendum procedure was not commented on by the Ohio Supreme Court below, in its majority Opinion. The minority of the Court, however, found other similar restrictive

requirements in Ohio substantive law,[24] and determined, in their Opinion, that such 55 percent voter requirement does not stand as an impediment to the constitutional validity of the referendum procedure established by the Eastlake Charter.

Even if this Court should find the 55 percent voter requirement of Article VIII, Section 3 of the Eastlake Charter to be unreasonable for any reason then such determination should not impair the validity of the remainder as provided by Article XI, Section 4 of the Eastlake Charter.[25]

## CONCLUSION

The issue in this case transcends zoning. The assault on the referendum process provided for by the Eastlake Charter is a manifestation of a new distrust of democracy and democratic processes, contemptuous of the wisdom and fairness of the ordinary voter who, it is claimed, might impose unreasonable restrictions on respondent's property.

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24. The fact that the charter section in question requires "55% favorable vote of all votes cast" does not, in my opinion, stand as an impediment to the constitutional validity of the referendum procedure established by the charter. Similar restrictive election requirements can be found in the statutes, e.g., R. C. 139.02 (for issuance of federal aid bonds); R. C. 133.16 (for issuance of bonds for reconstruction of bridges); R. C. 1515.04 (creation of soil and water conservation district); and R. C. 5705.191 (approval of excess tax levy). (Eastlake minority opinion (Pet. 37)).

NOTE: R. C. 133.16 requires 60% voter approval if submitted at a special election; R. C. 139.02 requires 65% voter approval; R. C. 1515.04 requires 65% voter approval; R. C. 5705.191 requires 55% voter approval if submitted at a special election.

25. "The determination that any section or part thereof of this Charter is invalid, shall not invalidate nor impair the force or effect of any other section or part thereof * * *" Eastlake Charter, Article XI, Section 4 (A. 63).



This distrust is disturbing as it seizes on the "due process clause" to denounce a neutral and traditional democratic process itself as being prohibited by the Federal Constitution.

The judgment of the State Court below places in jeopardy the democratic process whereby the electors reserve unto themselves the right of veto of the legislative acts of their elected officials as to land use changes by which the future development of their City will be determined and, in effect, substitutes the decision of the courts for the decision of the voters in determining what are to the best social and economic interests of the community as a whole.

Accordingly, petitioners pray that this Court reverse the judgment of the Ohio Supreme Court and affirm the decisions of the Court of Appeals and the Court of Common Pleas which sustained the constitutional validity of the Mandatory referendum provision of Section 3, Article VIII of the Charter of the City of Eastlake.

Respectfully submitted,

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# Supreme Court of the United States

October Term, 1974

No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF FOR RESPONDENT

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# Supreme Court of the United States

**October Term, 1974**

**No. 74-1563**

THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF FOR RESPONDENT

## QUESTION PRESENTED

Is an owner of land deprived of due process by a requirement that any change in use of his land, although duly validated by all appropriate municipal administrative and legislative bodies, must, *as a precondition to effectiveness*, be first submitted by the landowner to the general electorate for their consent and receive a 55% affirmative vote?

## STATEMENT OF THE CASE

Existing land uses in the City of Eastlake cannot be changed in any way under its Charter unless and until an applicant

> . . . first submits the required change to the City Planning Commission for approval or disapproval;
>
> . . . thereafter submits to a public hearing before the City Council and obtains Council's approval of the change; and
>
> . . . only after Council has adopted the land use change, submits the change to the electorate at the next regular (November) or special (May) election.

*The zoning change, notwithstanding its approval after public hearing by City Council, cannot become effective unless it receives a 55% favorable vote from the City's electors;* and if the change fails to receive the required consent of the electors, it cannot be resubmitted for at least a year and then only if the applicant has renewed the process with a fresh submission to the Planning Commission and the Council.

This ballot box zoning scheme was adopted by Charter amendment in November, 1971. In May of that year respondent had requested that the zoning on a parcel of vacant property which it owns in Eastlake be changed from an existing industrial use classification to one which would permit construction of a conventional apartment building. Both the Planning Commission and the City Council approved the requested change in December, 1971. However the Charter amendment had intervened. The approved rezoning could not, therefore, become effective without the vote of the people. Respondent objected that the amended charter was invalid. The City, nevertheless, submitted the proposed change to the electorate at the



May, 1972 election and it failed to receive the requisite 55% favorable vote.

Respondent then challenged the constitutional validity of this requirement of 55% voter consent for changes in land use. The action of the electorate in refusing to approve the particular change proposed for the use of respondent's parcel, notwithstanding the determination of reasonableness by the Planning Commission and Council, is not in issue. Rather the challenge here involves the unconstitutionality, on its face, of the so-called mandatory referendum requirement that any changes in land use, no matter how inconsequential to the voters as a whole, be approved by a 55% majority of the voting electorate.

Respondent believes, and the Ohio Supreme Court held, that this procedure for mandatory voter consent is inconsistent with the procedural due process required under the Fourteenth Amendment for a valid exercise of the police power. For the reasons set forth herein, that decision should be affirmed.

## SUMMARY OF ARGUMENT

### I

The Supreme Court of Ohio correctly found that the ballot box zoning procedure provided for by the Eastlake Charter constituted a denial of procedural due process under the Fourteenth Amendment. The Eastlake Charter subjects an owner of property to a process which permits the electorate to make a police power decision concerning the use of his property without reference to any ascertainable standards, and in the face of a determination by the City Council that the proposed use is in accordance with the public interest. Such a procedure is destructive of the process which is the crux of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); and the prior consent principles

embodied in the Eastlake scheme have already been condemned by this Supreme Court in *Eubank v. City of Richmond*, 226 U.S. 137 (1912) and *Washington, ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

II

The decision of the Supreme Court of Ohio recognizes the essentiality of planning in the zoning process. A comprehensive zoning plan, which contemplates and provides a rational basis for making changes, was central to *Euclid*. The plan, which takes into account the needs of a dynamic community, provides the constitutionally essential reference for assessing proposals for changes in land use. The Eastlake scheme for ballot box zoning, a simplistic and effective mechanism for perpetuating the status quo, lacks the rationality and measurability required under due process before the police power can be exercised to restrict individual property rights.

III

The Supreme Court of Ohio dealt with the appropriateness of ballot box decision making as a part of the zoning process and found that such decision making, in its failure to provide for the application of rational standards, is inconsistent with the due process protections required when a specific individual's proposed use of his land is directly at issue. This holding, which preserves the rationality required by *Euclid* in assessing the myriad of technical land use considerations involved in administering a comprehensive zoning plan, is entirely consistent with *James v. Valtierra*, 402 U.S. 137 (1971), which dealt not with the use of the police power to restrain individual property rights, but with the development, construction or acquisition of low-rent housing by public bodies, where the decision could lead to large expenditures of local governmental funds.



## ARGUMENT

### I. THE SUPREME COURT OF OHIO CORRECTLY FOUND THAT ZONING THROUGH VOTER CONSENT, AS REQUIRED BY THE EASTLAKE CHARTER, WAS NOT A PROPER EXERCISE OF THE POLICE POWER UNDER THE STANDARDS OF EUCLID v. AMBLER REALTY CO., 272 U.S. 365 (1926) AND WAS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Communities have long sought to regulate the private use of land so as to preclude uses perceived to be contrary to the common good. Restrictive covenants and the common law of nuisance provided primitive mechanisms for such regulation and for balancing the property rights of the individual land owner against the welfare of his neighbors.[1] By the turn of the century the developing police power of the states had been asserted to impose building codes, height limitations and restrictions on certain noxious industries. But it shortly became clear that such limited exercises of the police power were not sufficient to meet the complex problems encountered in the urban centers.[2]

The response to urbanization was the then new concept of comprehensive planning for community development.[3] By planning for the varied uses involved in an urban community, and by using an expanded police power to enforce the plan, the community could progress toward its goal of orderly development.

Inherent in a valid exercise of the police power is the requirement that the power be used reasonably and in accordance with a procedure to insure a proper balancing of individual rights and public welfare, with the goal

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[1] 1 R. ANDERSON, AMERICAN LAW OF ZONING §1.02 at 6 (1968).

[2] *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-388 (1926).

[3] While there are some early American examples of town planning, such as Major L'Enfant's design for Washington, D. C., urban planning, as a distinct discipline, did not come into being until the late nineteenth century. S. TOLL, ZONED AMERICAN 117 (1969).

of protecting both.[4] This balancing of public and private interests is especially sensitive in the area of *rezoning* where the choices to be made bear directly and immediately on the rights of the individual property owner. To insure that the balance is made, due process requires that the decision making procedure itself be such that it prevents variations from one case to the next which reflect "merely random or arbitrary choice." *McGautha v. California*, 402 U.S. 183, 248 (1971) (Brennan, J., dissenting).[5]

In land use and zoning, the due process requirement can be met only by the application of consistent standards to the choices to be made. On this score Eastlake's procedure is inherently deficient. Instead of mandating the application of standards, the Eastlake Charter substitutes ballot box decision making, which is clearly not translatable into standards, for the reasoned and discernable decision of a legislative body. It is because of this need to infer and apply standards that

> due process requires that procedures for the exercise of state power be structured in such a way that, ultimately at least, fundamental choices among competing state policies are resolved by a responsible organ of state government. 402 U.S. at 256 (citations omitted).

The constitutional necessity under due process that the procedure used to impose or change restrictions on the private use of land be referable to ascertainable standards had its inception, along with modern zoning and land

[4] E. FREUND, THE POLICE POWER §16 at 11 (1904).

[5] While *McGautha* involved the issue of jury sentencing, Mr. Justice Brennan, in urging the establishment of appropriate standards for the exercise of the sentencing power, made a complete review of the requirements of due process which are particularly relevant to rezoning.



use planning, in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In 1922 the City of Euclid, Ohio,[6] a suburb of Cleveland, following the then developing trend, adopted an ordinance establishing a comprehensive zoning plan. The entire area of Euclid was divided into six use districts, ranging from U-1, restricted to single family dwellings and certain public uses, to U-6 which encompassed the least desirable uses such as air fields and gasoline storage. A seventh class of uses was prohibited altogether. The plan also designated height districts, restricting the height of permitted buildings, and area districts, prescribing minimum square footage requirements for permitted buildings.

Ambler Realty Co. challenged the Euclid ordinance as depriving it of its property without due process and on equal protection grounds. The specific issue, as presented to this Court, was whether the ordinance violated the "constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?' " 272 U.S. at 386.

In finding that the Euclid zoning ordinance was a proper exercise of police power, Mr. Justice Sutherland articulated the required standards against which all similar exercises of police power have since been measured: Zoning provisions are unconstitutional when they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395.

In their application, the dual standards of reasonableness and a substantial relation to the public health, safety, morals or general welfare must be flexible to meet chang-

[6] The City of Euclid, while it does not presently have a consent ordinance in place, is a participant in this case as an amicus curiae on behalf of petitioner.

ing conditions. All regulations of land use, however, must "find their justification in some aspect of the police power, asserted for the public welfare."[7] Then, as now, a comprehensive plan forms the constitutionally necessary link between public health, safety, morals and general welfare, on the one hand, and specific restraints on the use and development of private property on the other.

*Euclid v. Ambler* also recognized the balancing of interests inherent in any zoning or rezoning. The legislative body of the City of Euclid had determined that the comprehensive zoning scheme was in the best interests of the community at large and bore the required relationship to the public health, safety, morals and general welfare. Mr. Justice Sutherland gave this legislative determination a presumption of validity and tested the comprehensive plan to determine whether the justifications for its restrictions were sufficient to preclude a finding that they were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. The Court noted the "painstaking consideration" which the zoning plan had received "at the hands of commissions and experts." 272 U.S. at 394. The results of their investigations were set forth in comprehensive reports, giving a legislative history for the plan, much as a planning commission report does today. This painstaking consideration of the plan by the experts played a major role in the presumption of validity accorded Euclid's zoning ordinance; it was clear that the legislative body had itself tested the plan and the underlying reasons for its enactment.

The thrust of this Court's decision in *Euclid v. Ambler* is that the use and development of private property cannot

[7] 272 U.S. at 387. This Court has recognized the need for a flexible definition of public welfare, but has not abandoned the necessity of applying standards to the exercise of police power. *See Berman v. Parker*, 348 U.S. 26 (1954).



be regulated by government unless it is shown that the regulation is reasonable and that it has a substantial relation to public health, safety, morals or general welfare. *By its very nature ballot box zoning is neither reasonable nor relevant to public health, safety, morals or general welfare.* Respondent believes, and the Ohio Supreme Court held, that the mandatory consent procedure required by the Charter of the City of Eastlake is repugnant to and destructive of the balancing process which is the crux of *Euclid v. Ambler* and the cornerstone of modern land use planning and zoning.

*Eubank v. City of Richmond*, 226 U.S. 137 (1912) preceded *Euclid v. Ambler* and foreshadowed the required presence of standards in a context similar to the present case.

*Eubank* involved an ordinance which provided that a building line would be established along a street upon request of two-thirds of the abutting property owners. The plaintiff in error had received a permit to build a house according to plans and specifications which had been approved by the building inspector. Shortly thereafter two-thirds of the property owners on the side of the street where plaintiff in error's lot was situated petitioned for establishment of a building line for the street and, in accordance with the ordinance, the building line was established coincident with the line of a majority of the existing houses. The plaintiff in error was informed that his house, which was not as yet under construction, must conform; and it did so, except for an octagonal bay window which extended about three feet over the line.

Having been fined for violation of the line, plaintiff in error attacked the validity of the ordinance on the ground that it deprived him of his property without due process of law. This Court agreed and held constitutionally objectionable an ordinance which,

> while conferring the power on some property holders to virtually control and dispose of the property rights of others, *creates no standard by which the power thus given is to be exercised;* in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. 226 U.S. 143-144 (emphasis supplied).

This Court observed that "even so arbitrary a thing as taste" might control the decision, 226 U.S. at 144, and the question critical to *Euclid v. Ambler,* and to the present case was posed:

> In what way is the public safety, convenience or welfare served by conferring such power? 226 U.S. at 143.

Similarly, in *Washington, ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116 (1928), which followed *Euclid v. Ambler,* the trustee of a home for the aged sought to replace an existing building with an enlarged structure. A Seattle ordinance, amending the City's comprehensive zoning plan, permitted the erection of the new structure, but made such approval subject to the trustee's obtaining written consent of two-thirds of the adjacent landowners. The trustee was unable to obtain the required consents and challenged the validity of the ordinance. This Court eliminated the consent requirement as unconstitutional. The adjacent landowners, Mr. Justice Butler wrote,

> are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo v. Hopkins,* 118 U.S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank v. Richmond,* 226 U.S. 137, 143. *Browning v. Hooper,* 269 U.S. 396. 278 U.S. at 122.

As if to anticipate the very situation here presented of a zoning change approved by Council, after a public



hearing, followed by inability to obtain consent from the voters, Mr. Justice Butler observed:

> [T]here is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that *the legislative body found that the construction and maintenance of the new house was in harmony with the public interest and with the general scope and plan of the zoning ordinance* . . . 278 U.S. at 121 (emphasis supplied).

The key to *Eubank* and *Roberge,* as in *Euclid v. Ambler,* is that an exercise of the police power designed to restrain the private use of land must be imbued with the dual standard of reasonableness and relation to the public health, safety, morals or general welfare. In both *Eubank* and *Roberge,* members of the community were given the power to effect or consent to a change in a particular owner's land use. The underlying infirmity was the absence of any assurance in the procedure that those given the power to regulate privately owned land would apply the *Euclid* standard in testing the relationship between the public interest and the action in question.[8] This defect was

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[8] Petitioner relies to the contrary on *Thomas Cusack Co. v. City of Chicago,* 242 U.S. 526 (1917). That case, as the Ohio Supreme Court recognized, is distinguishable from *Eubank, Roberge* and the present case. *Cusack* involved an ordinance prohibiting certain billboards. The ordinance had been adopted by the City Council and was fully effective. Variances in the prohibition were permitted with the consent of those community members directly affected, and this was upheld. The present case, on the other hand, deals with a procedure whereby a change in use is validated as reasonable by City Council, but cannot become effective without City-wide approval by the electorate. This procedure clearly falls within *Eubank* and *Roberge* rather than *Cusack.* This same distinction was drawn in *In re Hetrick's Appeal* 391 Pa. 148, 137 A.2d 310 (1958); *Robwood Advertising Ass'n, Inc. v. City of Nashua,* 102 N.H. 215, 153 A.2d 787 (1959); and *Schalte v. Garnett,* 186 Kan. 117, 348 P.2d 629 (1960).

particularly evident in *Roberge*, where the legislative body had determined by its adoption of the change that the proposed building was in fact "in harmony with the public interest." 278 U.S. at 121.

There is no essential distinction by which Eastlake may avoid for its consent procedure the same fate visited by this Court on the consent ordinances in *Eubank* and *Roberge*. Eastlake's planning and zoning process, prior to the 1971 amendment, was typical of those rational zoning procedures which were developed, virtually nationwide, out of *Euclid v. Ambler*. Eastlake adopted a comprehensive zoning plan reflective of the public health, safety, morals and general welfare, broadly conceived; and it then provided a procedure for change at the initiative of individual property owners. The rezoning process contemplated submittal to a Planning Commission, the retention of experts and consultants where necessary, a report to the City Council, a formal, noticed hearing where the public could participate,[9] and enactment of the rezoning by the City Council "whenever the public health, safety, necessity, convenience, comfort, prosperity or general welfare, and compliance with the Master Plan or good zoning practice justify the action. . ."[10]

In 1971 Eastlake superimposed on this mechanism for rational and reasonable rezoning the overriding requirement that nothing done by the legislative body to enact an individual applicant's change would take effect unless and until consented to by 55% of the electorate. Such a mandatory consent requirement converts the rational scheme for rezoning mandated by *Euclid v. Ambler*, and formerly followed by Eastlake, to a process which by its very nature does not permit the application of due

[9] Charter of the City of Eastlake, Article VIII (A. 52-55).

[10] Codified Ordinances of the City of Eastlake §1165.02 (reproduced in full in the Appendix to this brief at page 25).



process standards and is inherently arbitrary and thus unreasonable.

Under Eastlake's ballot box zoning plan, no mechanism exists for assuring that the voting public has the benefit of the factual underpinning necessary to assess rationally a proposed change in the context of the comprehensive plan and the then existing circumstances. Rather, a 46% minority of those who happen to vote can effectively frustrate a change in use which has been fully validated by the City's planning and legislative process; and they may do so without regard to any standards or, as the Ohio Supreme Court observed, based solely on whim or caprice (Pet. 23, 28).

In matters of rezoning, which directly affect individual rights, the potential for abuse and arbitrary action dictates that decisions be reached by a responsible organ of government, charged with a duty to act reasonably and in a way that demonstrably and consciously can be related to previously established standards. There is no way, under ballot box zoning, for the decision makers to apply the standards enunciated in *Euclid v. Ambler* or to articulate any basis for the decision to accept or reject the requested rezoning. Indeed, as petitioner and its amici curiae are eager to explain, the vote of the electors is impervious to any process for review and examination!![11]

[11] If this principle of ballot box control of zoning were to be sanctioned, judicial review of rezoning decisions would necessarily proceed de novo, thus increasing the burden on the courts and potentially reducing the local control so strongly urged by petitioner. The solution for frustrated public officials, but hardly for the Courts, might be the one recently suggested by the Mayor of Parma, one of the amici curiae, when the voters rejected three constructive rezoning proposals: Have the Council reject desirable rezoning proposals and let the property owner go directly to Court for relief rather than grant the rezoning and risk another turn down by the people. Parma Sun Post, November 13, 1975, at D2. Judicial intervention as an ameliorative solution

*(Continued on next page)*

The Supreme Court of Ohio recognized these constitutional infirmities in invalidating the Eastlake plan. Its decision should be affirmed.

## II. THE DECISION OF THE OHIO SUPREME COURT REAFFIRMS THE CONSTITUTIONAL MANDATE FROM EUCLID v. AMBLER OF RATIONAL DECISION MAKING, KEYED TO A COMPREHENSIVE PLAN, AND IS THUS SUPPORTIVE OF RELATED STATE, FEDERAL AND JUDICIAL POLICIES.

Planning was central to *Euclid v. Ambler*. It was the presence of a comprehensive plan, which, in general application, was not arbitrary or unreasonable, and bore a substantial relation to public health, safety and welfare, which allowed the Court to sustain zoning as a method of regulating the use of private property. The comprehensive plan is also the keystone which supports the validity of the zoning ordinance: If the plan is defective, the zoning necessarily fails, for it is the land use plan which provides the essential constitutional link between the public welfare and the implementing restrictions on private property.[12]

Planning requires a consideration of all of the multiple facets of community development: existing population and projected growth; economic factors and future needs for development; service facilities, including sewers, transportation, public utilities, schools and recreational facilities and the burdens which growth will place on such

*(Continued from previous page)*

for ballot box rezoning is of course equally unacceptable on a number of grounds, not the least of which is the difficulty of reconciling the decision of the Council to rezone with the refusal of the inscrutable electors to permit it.

[12] *See C. Miller Chevrolet v. Willoughby Hills*, 38 Ohio St. 2d 298, 313 N.E.2d 400 (1974); *Udell v. Haas*, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 235 N.E.2d 897 (1968); Haar, *In Accordance with A Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).



facilities; the physical facts of the community, both geographic and in relation to its neighboring communities; and the existing and projected tax structure.[13] These are the traditional factors to be considered in meeting the needs of the community. However, a proposed land use plan as "an expression of physical, social and economic goals"[14] must increasingly take into account more sophisticated factors as, for example, the impact of the plan on the environment.[15]

Municipal planning and zoning are also impacted by important state and federal programs. Ohio provides for a regional planning commission with which municipal planning commissions may cooperate in order to develop a comprehensive plan for the region with which municipal planning would be consistent.[16] In addition, the regional commission is charged with offering technical assistance on planning to local units of government, and to reviewing and commenting upon local zoning regulations.[17] The Ohio Department of Economic and Community Development also promotes comprehensive planning by providing technical planning assistance to local and regional planning bodies for land use studies.[18] Thus, Ohio's policy is to enhance the professional quality of local planning efforts with respect to land use.

The federal policy in favor of comprehensive planning is principally embodied in the "701" program of the Department of Housing and Urban Development. A part of the 1954 Housing Act, the purpose of the program is to help local governments solve comprehensive planning problems

[13] ANDERSON, *supra* note 1, §1.03 at 8.

[14] I MCHARG, DESIGN WITH NATURE 93 (paperback ed. 1971).

[15] *Id.*

[16] Ohio Revised Code §713.23.

[17] *Id.*

[18] Ohio Revised Code §122.06.

and to encourage the establishment and improvement of planning staffs and techniques.[19] Grants may be made to states to be passed through to municipalities. However, the activities assisted must be "carried out by professionally competent persons" and the planning process must take into account the housing needs of both the region and local communities.[20] The Federal Water Pollution Control Act, as amended in 1972, also mandates planning to deal with water pollution,[21] including land use restrictions necessary to control pollution.[22]

The single thread which runs from *Euclid v. Ambler* through these diverse but interrelated land use planning efforts is the need and inevitability of change. Just as change is itself a reality of life, so must comprehensive land use planning, with its implementing zoning regulation, be continually evaluated for possible modifications.[23] Zoning, moreover, carries within itself a unique necessity to remain flexible rather than immutable: Since zoning impinges directly on the free use of private property, there must be a rational means, keyed to due process, for granting alterations in use and exceptions and variances which are responsive to individual needs as they arise within the framework of the comprehensive plan.

Where, in the Eastlake scheme of ballot box zoning, is there room for the discrete judgments required in order to effectuate those inevitable changes generated by individual needs and altered circumstances while still retaining the basic objectives of the comprehensive plan?

How can a voter, as he marks his consent ballot, assess

[19] 40 U.S.C.A. §461(a) *as amended* (Supp. 1975).

[20] 40 U.S.C.A. §461(b) *as amended* (Supp. 1975).

[21] 33 U.S.C. §1251(a)(5) (Supp. II, 1972).

[22] 33 U.S.C. §1288(b) (Supp. II, 1972).

[23] See *Euclid v. Ambler*, 272 U.S. 365, 386-387; *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968); 3 ANDERSON *supra* note 1, §17.14 at 307.



whether the proposed zoning change is reasonable, is within the terms of the comprehensive plan, and meets the constitutional standards?

Under the Eastlake plan these judgments cannot be made; and experience has demonstrated this to be true. In the brief period between the adoption of the Eastlake Charter amendment and its invalidation by the Ohio Supreme Court in this case, no less than seventeen suburbs surrounding Cleveland proper adopted voter consent ordinances or charters of the Eastlake type.[24] To respondents knowledge, not one proposal by an individual property owner for a change in zoning has since received voter approval. Illustrative is the result of the November, 1975 election in the City of Parma, one of the amicus curiae supporting petitioner. In Parma, a city with a population of 100,000, the property owner faces a twofold consent hurdle. The Parma ordinance requires a 50% favorable vote in the City at large and a 50% approval by those voting in the very ward in which the property to be rezoned is situated.[25] Three rezoning requests, having been previously adopted by City Council after public hearing, went to the polls for voter consent and all three were defeated both City-wide and in the particular wards where situated. Ballot box zoning is quite obviously not a procedure for rezoning but rather a permanent enactment of the status quo.

What then is the true meaning and objective of these Eastlake type plans?

[24] A listing of these suburbs, showing population and voter registration, is provided in the Appendix to this brief at page 27. There were seventeen voter consent plans in effect when this case was briefed before the Ohio Supreme Court. Garfield Heights and North Olmsted indicate in their Amicus Brief that they have since joined the group; and Euclid, a city of 71,000, has indicated, by its amicus participation, an interest in following suit.

[25] The Parma Ordinance is reproduced in the Appendix to this brief at page 25.

The four judge concurring opinion in the Ohio Supreme Court exposed the true nature of these superimposed requirements for voter approval:

> There can be little doubt of the purpose of Eastlake's Charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. . . .
>
> There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.
>
> . . .
>
> Zoning provisions such as that in Eastlake's Charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas. . . . (Pet. 28, 29.)

And there is no denying the awesome truth of these insights. Cleveland and its mature suburbs have now been ringed with Eastlake type restrictions—a veritable choke collar against change in the large lot, single family, residential use predominating in these restrictive suburban communities.[26]

The *Euclid v. Ambler* approval of zoning restraints on private property was grounded in the existence of a plan which provided a reasoned, comprehensive basis for

[26] The map reproduced in the Appendix to this brief at page 29 illustrates the choke collar against change which now constricts Cleveland. This exclusionary phenomenon is not unique. Eminent courts in addition to Ohio's have considered such exclusionary practices and invalidated them. *See Southern Burlington City NAACP v. Twp. of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (*appeal dismissed* 44 U.S.L.W. 3181); *National Land and Investment Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Bristow v. City of Woodhaven*, 35 Mich. App. 205, 192 N.W.2d 322 (1971); *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E. 2d 33 (1975).



dealing with individual property owners in differing ways. The zoning ordinance sustained in *Euclid* provided a reasonable basis for implementing the land use plan and a mechanism for resolving disputes and making changes. The Eastlake scheme of ballot box zoning effectively destroys these underlying premises and is thus destructive of the due process principles on which *Euclid v. Ambler* was grounded.

The Supreme Court of Ohio recognized this absence of any constitutional justification for Eastlake's mandatory consent procedure. Its decision should be affirmed.

## III. THE DECISION OF THE SUPREME COURT OF OHIO DOES NOT IMPAIR THE RIGHT OF THE PEOPLE TO VOTE.

It has been urged that the decision of the Supreme Court of Ohio denies the people the right to vote; and the petitioner and its amici curiae have liberally garnished this assertion with such halcyon phrases as "participatory democracy", "maintenance of people's power", "government by the people" and "cherished right to vote."

This argument, imbued with rhetoric and based in major part upon various voting-rights cases, is ill-conceived and without substance. The issue in this case is not the disenfranchisement of any portion of the populace, but rather it is the appropriateness, under due process, of community-wide ballot-box decision making as part of a rezoning procedure which impinges directly on an individual property owner.

There is of course no denial of public participation in zoning matters, either in Eastlake or elsewhere. The public is assured by Charter and ordinance of a deliberative process which includes open meetings of specialized planning and zoning bodies, public reports and recommendations, and ultimate action by elected officials to

whom have been delegated the measurable duty of acting in accordance with standards prescribed by the legislature or judiciary. Moreover, the concepts of public notice and public hearings permeate the zoning process. The affected public is therefore assured of its voice and its influence;[27] and in the end those officials who are not adequately responsive face rejection from office at the polls.

Under the Constitution, however, the people are not free, absent due process protections, to assume direct decisional control over each and every individual property owner's exercise of his rights. Zoning, by its very nature, involves restraints imposed under the police power on the exercise of individual rights. It is this fact that mandates that zoning decisions be made by a body which can be charged with the duty of applying the proper due process standards; and it is in this sensitive balancing of individual rights against the public interest that the distinction lies between day to day zoning decisions and those governmental policies which may properly be subjected to a mandatory referendum process.[28]

This is the distinction inherent in the case of *James v. Valtierra*, 402 U.S. 137 (1971). *Valtierra*, as the Ohio Supreme Court noted, did not concerning zoning, but rather authorization to a public body to develop, construct or acquire low-rent housing. The California Supreme

[27] *See* text accompanying notes 9 and 10 *infra* and 1 ANDERSON, *supra* note 1, §4.02-4.03 at 156-59.

[28] This inherent characteristic of zoning and rezoning is demonstrated by the fact that some courts treat zoning as judicial or administrative rather than purely legislative. *Fasano v. Board of County Com'rs of Washington City*, 264 Or. 574, 507 P.2d 23 (1973); *Bird v. Sorenson*, 16 Utah 2d 1, 394 P.2d 808 (1964); *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972); *Cooper v. City and County of Denver*, 536 P.2d 874 (Colo. 1975). The very fact that rezoning requires a public hearing is evidence of its inherent need for due process safeguards.



Court had earlier held that the actions of local housing authorities, established to take advantage of federal financing for low-rent housing, were not subject to California's referendum provisions. The California Constitution was then amended to provide that no public body might develop, construct or acquire any low rent housing until the project had been approved at a referendum election.

Citizens claiming they qualified for low-rent housing challenged the referendum requirement on the basis that it effectively deprived them of low-rent housing and was therefore violative of the Supremacy Clause, the Privileges and Immunities Clause and the Equal Protection Clause. *There was no due process claim nor were the rights of any individual property owner directly at issue.* In upholding this referendum requirement, Mr. Justice Black, speaking for this Court, drew the critical distinction:

> [Referendum approval of low-rent public housing projects] ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues . . . 402 U.S. 137, 143.

*Valtierra* involved, not an exercise of the police power to restrain individual property rights in the context of rezoning, but a broader, general policy decision regarding public sponsored low cost housing which would impact on public services and funds.[29]

It is this same distinction which also inheres in those few situations for which Ohio provides a mandatory ref-

[29] Petitioner strains to blur the overriding public policy basis of *Valtierra* by stressing that respondent sought to construct an apartment, whereas the issue here is not the particular rezoning but the due process deficiencies of the Eastlake procedure. The *Valtierra* distinction is also present in *Southern Alameda Spanish Speaking Organization v. City of Union City Cal.*, 424 F.2d 291 (9th Cir. 1970) and *Ranjel v. City of Lansing*, 417 F.2d 321 (1969) *cert. den.* 397 U.S. 980, cited by petitioner.

erendum. As the Ohio Supreme Court recognized, the initial enactment by County Commissioners or Township Trustees of a comprehensive zoning code for the unincorporated area of a county or township is clearly a community policy decision for the unincorporated area, affecting all landowners equally, not just a single property owner, and thus only indirectly involving individual rights. Where, however, changes are later required in such a county or township plan, those *rezoning* issues, directly affecting as they do the individual property owner, are *not* subject to mandatory referendum.[30]

There is a constitutional imperative for this distinction between zoning per se, as a broad community policy, and preservation of a reasonable means for effecting change in response to individual needs and circumstances. Zoning, as an exercise of the police power, involves the balancing of individual property rights against the public welfare. It is clear that the myriad of technical land-use matters which must be considered are not appropriate for a direct community-wide exercise of police power, especially in view of the accompanying deprivation of due process rights. The Ohio Supreme Court dealt with this point succinctly:

> It can scarcely be contended that every proposed land use change, no matter how small, in a city with a population of 20,000, either involves or allows community-wide policy-making. Rather, most involve hardships affecting individual parcels of property, which must be alleviated to preserve the constitutional validity of the ordinance. (Pet. 25.)

There may be areas, as in the case of the initial imposition of a comprehensive land use plan, where the community's interest in prescribing the policies regarding use of land, as those policies affect and benefit all property

[30] Ohio Revised Code §§303.12, 519.12.



owners alike, will negate an individual owner's claim that in such instances the police power must be exercised in the same manner as when his property rights are directly and tangibly at issue as in the case of rezoning. The vice in the Eastlake scheme is its failure to draw any distinctions. In its reach, the Eastlake Charter encompasses even those land use decisions regarded by the Ohio Court as administrative rather than legislative.[31] This scheme does not reflect that reasonable margin for error spoken of in *Euclid v. Ambler,* but is instead a gross overreaching, destructive of the balancing of interests required by due process.

## CONCLUSION

This case has generated as many viewpoints as there are parties and amicus participants. Respondent has intentionally eschewed commenting on all of them. One thing seems certain, however: This case does not represent an assault upon the referendum process, properly viewed, or on responsible government.

The stakes rather lie in how a community may constitutionally constrict the avenues of changes which since *Euclid v. Ambler* have been essential ingredients in the constitutionality of the rezoning process. An individual property owner is constitutionally protected by the due process requirement that rezoning procedures be so designed as to result in reasonable restrictions reasonably referable to the police power standards of health, safety, morals and the general welfare.

Eastlake superimposed on an otherwise traditional zoning system a requirement for 55% voter approval be-

[31] The Ohio Supreme Court held that to the extent the Charter amendment would require a referendum on those matters traditionally characterized as administrative, for example hardship variances which are provided for by Charter or ordinance and do not require a rezoning, it was clearly invalid. (Pet. 15-17).

fore any change, no matter how thoroughly supported and insignificant to the community at large, could become effective. The Supreme Court of Ohio, in a searching exploration through the two opinions of Justices Brown and Stern, viewed this Eastlake scheme as lacking in those protections to the individual property owner necessary under due process and as having a stultifying effect on change inimicable to this fundamental requirement for valid land use control.

For the reasons so thoroughly set forth by the Ohio Supreme Court, and those developed above, the decision below should be affirmed.

Respectfully submitted,

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## APPENDIX

**Codified Ordinances of the City of Eastlake §1165.02:**

CHANGE BY ORDINANCE.

Whenever the public health, safety, necessity, convenience, comfort, prosperity or general welfare, and compliance with the Master Plan or good zoning practice justify the action, and after consideration by the Planning Commission, Council may change by ordinance the districts or the regulations established by this Zoning Code, subject to the provisions of Article VIII, Section Three of the Charter.

**Codified Ordinances of the City of Parma §1229.01:**

(a) Any amendment to, or change in, the existing zoning laws of the City, originating with the Council, shall be submitted to the Planning Commission, which shall be allowed a reasonable time, not less than thirty days, for consideration and report to Council. After such consideration and report, Council shall hold a public hearing on such proposed amendment or change, giving not less than thirty days notice of the time and place thereof, in two newspapers of general circulation within the City; and during such thirty days the text or copy of such ordinance or measure, proposing such amendment or change, and all papers pertaining thereto and the report of the Planning Commission shall be on file with the Clerk of the Council for public examination.

That any change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land and the selling or leasing or rental of parkways, playgrounds, or other city lands or real property, or for the widening, narrowing, re-locating,

vacating, or changing the use of any public street, avenue, boulevard, or alley cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the City Council should approve any of the preceding changes, or enactments, whether approved or disapproved by the Planning Commission, it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a majority vote of the Electors of the City, and of each Ward in which the property so changed is located, said rezoning to be voted on at the regular municipal election, if one shall occur not less than sixty (60) or more than one hundred twenty (120) days after its passage; otherwise, at a special election falling in the generally established day of the primary election. The City Auditor shall advertise, the requested land use change in the newspaper of general circulation, whose circulation is either the largest, or second to the largest within the limits of the City for two consecutive times, with at least two weeks between notices, and a third notice one week prior to the election.

(b) If this section is violated and a building is under construction or completely constructed it shall be mandatory for the Mayor, Safety Director, Service Director and Building Inspector equally, to have the building or structure removed completely within sixty (60) days at the owner's expense.



**Cleveland Suburbs Having or Supporting Mandatory Voter Consent Requirements for Changes in Land Use[1]**

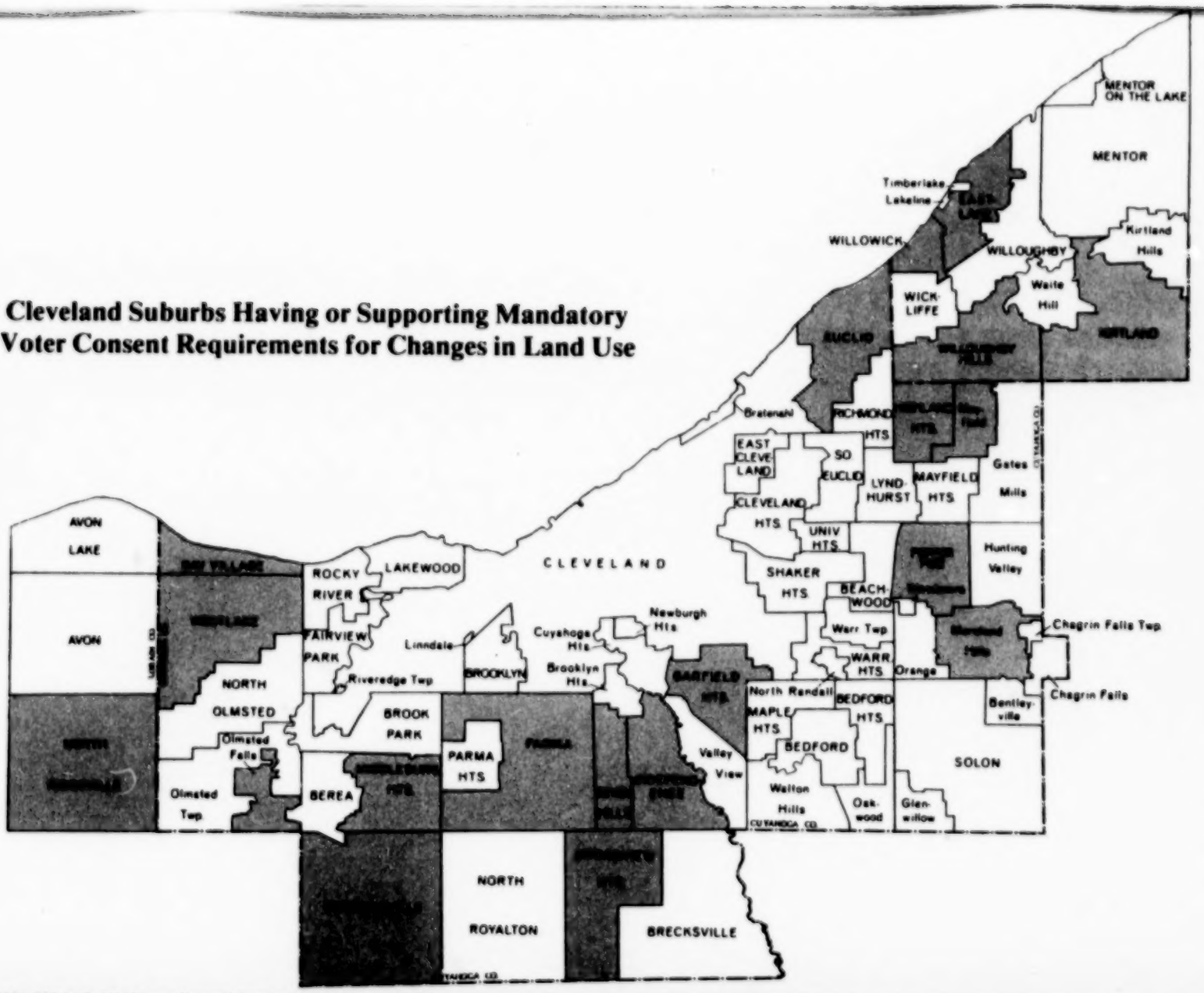
| | Population[2] | Reg. Voters[3] |
|---|---|---|
| Bay Village | 18,163 | 10,056 |
| Broadview Heights | 11,463 | 5,234 |
| Eastlake | 19,690 | 7,024 |
| *Euclid | 71,552 | 36,559 |
| Garfield Heights | 41,417 | 20,118 |
| *Highland Heights | 5,926 | 3,077 |
| Independence | 7,034 | 4,093 |
| *Kirtland | 5,530 | 2,329 |
| Mayfield Village | 3,548 | 1,930 |
| *Middleburg Heights | 12,367 | 6,945 |
| Moreland Hills | 3,000 | 1,685 |
| North Ridgeville | 13,152 | 4,608 |
| Olmsted Falls | 2,504 | 1,218 |
| *Parma | 100,216 | 47,448 |
| Pepper Pike | 5,933 | 3,169 |
| *Seven Hills | 12,700 | 6,495 |
| Strongsville | 15,182 | 6,366 |
| Westlake | 15,689 | 7,648 |
| *Willoughby Hills | 5,247 | 2,749 |
| *Willowick | 21,237 | 8,743 |

[1] Cities participating as amicus curiae are indicated with an asterisk.

[2] Population figures are for 1970. Ohio Almanac, 69-71 (1974).

[3] Election figures are also for 1970. Ohio Election Statistics 1971-1972, 366-337 (1973).

**Cleveland Suburbs Having or Supporting Mandatory Voter Consent Requirements for Changes in Land Use**



Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

**October Term, 1974**

**No. 74-1563**

THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## REPLY BRIEF FOR PETITIONERS

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# Supreme Court of the United States

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THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*

**vs.**

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## REPLY BRIEF FOR PETITIONERS

## STATEMENT OF THE CASE

This brief of Petitioners will be restricted to reply to new matter contained in Respondent's Brief, answer to the various supporting amici briefs, and to correct a misstatement of fact by the Respondent.

Respondent, in its attempt to show the Eastlake zoning procedure does not work in practice, states that to Respondent's knowledge, "Not one proposal by an individual property owner for a change in zoning, has since received voter approval" (Br. of Res. 17). That Respondent's knowledge should be so restricted is inconceivable, as the so-called Gateway Motel project (involving re-zoning of 9.1 acres of land from industrial to general business use classification) was submitted to the electors of the City of Eastlake,

pursuant to Charter Amendment, in the May 1973 special election, and received a 78% affirmative vote.[1] Such rezoning issue received substantial publicity in the local community and was the subject of comment in oral argument by petitioners before both the Court of Appeals and the Ohio Supreme Court.

It is significant to note that Respondent makes no claim, nor does the record so indicate, that the comprehensive zoning plan of the City of Eastlake does not make adequate provision for areas where multiple housing may be constructed, or that Respondent has suffered any economic damage due to failure of the electorate of the City of Eastlake to approve the requested rezoning, or in fact, that it is good city planning to spot zone for an apartment oasis to be located between industrial and business zoned property as requested by Respondent.

Throughout the Brief of Respondent, and the Briefs of its amici, is an appalling distrust of traditional democratic principles and process as applied to rezoning. The fear is that the voting public, if allowed to do so, *might* make the wrong decision.

The real issue is whether the ultimate and final power in respect to rezoning shall be vested in the people of any given community or in their elected representatives. Otherwise stated, shall the government, insofar as rezoning is concerned, be the traditional "Of the people, by the people, and for the people", or, as Respondent and amici contend, be "By the elected representatives, for the people"?

---

1. Ordinance No. 1973-7 of the City of Eastlake, changing use of land from General Industrial to General Business zoning classification received an affirmative vote of 2239 with a negative vote of 633 at a special election on May 8, 1973 (See Appendix A).



Petitioners' basic position is that to the extent that legislative action, discretion, and decision can constitutionally be made at the local level by the local legislative body, and to the extent that they do so, that action, discretion and decision, can be shared by the voters of that local public entity who are the more supreme power, the power of the people themselves, acting within, and in concert with their constitutional rights. The judgment and decision of the Court below places in jeopardy such constitutional right and power of the people.

## ARGUMENT

### I. THE PURPOSE AND EFFECT OF THE EASTLAKE CHARTER AMENDMENT IS A LOCAL ISSUE TO DETERMINE HOW CITY POWER WILL BE DISTRIBUTED BETWEEN THE ELECTORATE AND THE ELECTED REPRESENTATIVES AND PRESENTS NO FEDERAL CONSTITUTIONAL ISSUE.

The closer a subdivision of a government gets to the grass roots, the more reasonable is a classification requiring voter approval. The burden, financially and environmentally, falls on the local citizens and it is the *people themselves* who should decide and determine the need and desirability for rezoning, which rezoning changes a comprehensive zone plan which they, the people themselves have, by democratic process, previously adopted.

The sovereignty of a state rests in its people, by whom and for whom all government exists. The manner in which they distribute or parcel out its exercise is not a federal justiciable question. *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1973). *Hughes v. Superior Court*, 339 U.S. 460

(1950). They may retain all or any part of it in their own hands, as by the initiative or referendum. *Pacific Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Granting some or all of that exercise of sovereignty to legislative bodies, state or local, they may retain or resume the remainder.

The initiative and referendum were born of an urge to curb the power of the wealthy and entrenched so as to benefit the disadvantaged. This Court is now called upon by Respondent, who may be classified among the wealthy and entrenched, to utilize the Fourteenth Amendment of the Federal Constitution to redistribute the legislative power of a state and its subdivision to deprive the people of their constitutional right of referendum insofar as rezoning is concerned.

What respondent herein contends is that as a matter of constitutional law, voters are to be held inherently disqualified from passing on certain kinds of issues. The voters are accused of being biased and unworthy to pass on questions better left to wiser heads. The argument is that the electorate acts in ways wholly capricious, not governed by any ascertainable standards in respect to rezoning matters. This is equally true, however, of the electorate whenever it votes for a candidate or on any measure. Is democracy then unconstitutional? The right to vote should not be denied because of fear that voters may act unwisely or out of whim and caprice. Local government is the pervasive characteristic of our republic.

The referendum vote is but a step in the legislative process, the last in a series necessary to obtain rezoning of property in the City of Eastlake. This is the last resort check upon the affirmative actions of the City council, the agent of the sovereign people. No claim is made by Respondent that anything violates the due process clause of the Fourteenth Amendment to the Federal Constitution ex-



cept the provision for referendum itself. The question in this case is whether the mere requirement that a question on rezoning be put to the electorate violates the due process clause of the Federal Constitution.

The final control and direct voice of the electorate are the very bone of democracy. What the respondent and its amici ask, therefore, is the Court to strike at a basic characteristic of democracy in Ohio. Not one case can be found by Petitioners, nor has the Respondent or its amici cited such a case, where this Court has accepted Respondent's contention and condemned the automatic referendum process *itself* as being in violation of due process and unconstitutional.

## II. THE EASTLAKE VOTING PLAN IS BUT ONE FINAL STEP IN A TRADITIONAL REZONING PROCEDURE WHICH PROVIDES FOR PROCEDURAL DUE PROCESS AND INSURES COMPLIANCE WITH THE STANDARDS OF THIS COURT SET FORTH IN EUCLID v. AMBLER REALTY CO., 272 U.S. 365 (1926).

Respondent's eye-catching reference to the Eastlake Charter Amendment as a "ballot box zoning scheme" is a misnomer and presupposes that all rezoning matters are arbitrarily submitted to the electorate for a vote and that the final decision will be based upon the whim and caprice of the voting public without resort to substantive and procedural standards. Such is not the case.

The Eastlake rezoning process, in which the vote of the electorate is only the final step, requires first the consideration of the City Planning Commission, after public hearing, for report and recommendation to council. At this level, in which professional planning advice is avail-

able, all the technical variables and traditional factors are considered, as set forth in detail in Respondent's Brief.[2] Technical assistance may also be obtained from the State and Federal agencies empowered to furnish assistance in such matters.

Additionally, the standards of reasonableness and substantial relation to the public health, safety, morals or general welfare, as enumerated in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), must be met in order to secure a favorable recommendation on the rezoning application from the City Planning Commission.

The next step in the rezoning process is the submission of the rezoning application to City Council, the elected representatives of the people, in which the same technical and governmental assistance is available and, after public hearing and consideration of the City Planning Commission report and recommendation, the City Council reaches a decision as to whether the requested zoning change should be approved or disapproved.

The City Council, in arriving at a decision, must consider the traditional multiple facets of community development previously considered by the City Planning Commission and whether the proposed rezoning meets the procedural safeguards and dual standards of *Ambler*.

If City Council finds the proposed rezoning does not meet physical, technical or traditional standards, or does

---

2. Planning requires a consideration of all the multiple facets of community development; existing population and projected growth; economic facts and future needs for development; service facilities, including sewers, transportation, public utilities, schools and recreational facilities and the burdens which growth will place on such facilities; the physical facts of the community, both geographic and in relation to its neighboring communities; and the existing and projected tax structure. 1 R. ANDERSON, AMERICAN LAW OF ZONING, Sec. 1.03 at 8 (Br. of Res. 14, 15).



not meet the procedural and substantive safeguards and standards of *Ambler*, then the rezoning request is denied. It is only after the City Council has determined the rezoning meets all technical requirements, and the dual standards of reasonableness and relation to the public health, safety, morals, or general welfare, and an affirmative decision is made, that the rezoning is submitted for approval of the electorate, as the final step in the Eastlake zoning process.

As a direct and proximate result of the Eastlake Zoning procedure, the electorate is not called upon to assess whether the proposed rezoning meets with technical requirements or whether the rezoning is reasonable and meets the requirements of *Ambler*, as these matters have been predetermined in the zoning process by the action of the City Planning Commission and Council who, if their job is correctly done, have previously eliminated rezoning applications which do not qualify.

The Eastlake procedure provides for removal of final issues of public policy on complex and important matters of rezoning,[3] in which the future development of the community may be determined, from the forum of the Council to the forum of the electorate, and the rule of popular democracy, where proponents and opponents are given all the privileges and rights to express themselves in an open election that a democracy or republican form of government can afford to its citizens.

Whether the policy of giving to the public generally a referendum vote on zoning when the effect may be more

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3. "It (zoning) may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life". (Justice Marshall in *Belle Terre v. Boraas*, 416 U.S. 13 (1974)).

acutely felt in a given district than by a community at large may be questioned as the wisest exercise of power in such cases, but this is a question of public policy to be determined by the people of any given community.[4]

It should be emphasized, contrary to the misquote by Respondent of Petitioner's position[5] that the final decision of electorate is subject to judicial scrutiny as to any given parcel of property, if such decision is unreasonable or does not otherwise meet the requirements and standards of *Ambler*.

*Eubank v. City of Richmond*, 226 U.S. 137 (1912) and *Washington, ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), heavily relied upon by Respondent and amici to condemn the Eastlake zoning process, had no procedural safeguards and created no standards by which the power conferred on adjacent property holders might be exercised. Such cases have no application to a rezoning process which incorporates procedural safeguards and standards and certainly has no application where the general zoning powers of an entire community are at issue.[6]

---

4. *City of Coral Gables v. Carmichael*, Fla., 256 So.2d 404, 409.

5. Respondent states "Indeed, as petitioner and its amici curiae are eager to explain, the vote of the electors is impervious to any process for review and examination!!" (Br. of Res. 13).

6. As stated by Justice McKenna in *Eubank*, 226 U.S. 144, "We need not consider the power of a city to establish a building line * * *" and by Justice Butler in *Roberge*, 278 U.S. 123, "We need not decide whether, consistently with the Fourteenth Amendment, it is within the power of the State or municipality by a general zoning law to exclude the proposed new home for a district * * *".



## III. THE EASTLAKE CHARTER AMENDMENT ADDS LITTLE, IF ANY, BURDEN TO THE APPLICATION FOR REZONING.

All traditional rezoning procedural steps remain the same under the Eastlake Charter process with the exception that the affirmative vote of the electors is required prior to any zoning change becoming finally effective. Substantive rights also remain the same as rezoning has always been an appropriate subject of referendum under the express provisions of the Eastlake Charter by 10% affirmative petition.

In the case of an applicant whose property is destined to be the subject of referendum, there is no change at all so far as the applicant is concerned. The difference to the electorate being the necessity to circulate a referendum petition.

If anything the Eastlake Charter Amendment takes away from the applicant for rezoning the uncertainty as to whether his particular application will be the subject of referendum by petition. At most, the Eastlake Charter Amendment adds six (6) months to the applicant's time table for final decision as the matter is required to be submitted at the next general (November) or special (May) election (App. 70).

There is little substance to the charge that the purpose of Eastlake's Charter provision adds such a burden to change as to be prohibitive. All democracy, by its very nature, requires time for decision making and such delay has never been found to be a constitutional bar to the exercise of the democractic process.

## IV. THE ASSAULT IN THIS CASE IS UPON THE ENTIRE REFERENDUM PROCESS AS IT APPLIES TO REZONING: TO DENY THE RIGHT OF THE PEOPLE TO VOTE ON MATTERS VITALLY AFFECTING THE FUTURE DEVELOPMENT OF THEIR COMMUNITY.

While Respondent and amici give lip service to the proposition that this case does not represent an assault upon the referendum process (Br. of Res. 23), there is no question that their various briefs reach that end result insofar as rezoning is concerned. Can the voting electorate be any more qualified to vote, or the standards or safeguards to the final decision be any different, when a rezoning decision is submitted to the electorate by a mandatory referendum process as opposed to a petition referendum?

Adoption of a comprehensive zoning plan by the electorate, which Respondent and amici do not condemn (nor could they in view of the decision of this Court in *Ambler*) constitutes a political decision of policy as to how each individual community will develop. Any rezoning, which constitutes a change of such comprehensive zoning plan, by its very nature, be it large or small, constitutes a change of such policy. Respondent and amici are not in the unique position of advocating that the voting electorate may establish zoning policy by acceptance of a comprehensive zoning plan, but are not qualified, due primarily to suspicion the electorate may vote by whim and caprice, to determine change to such zoning policy.

Respondents and amici would take away completely the right of decision making by the voting public in matters of rezoning and would place in City Council, whom they consider to be a wiser and responsible organ of government, the final power of decision making on rezoning, and



in effect, place final zoning policy decisions in the elected representatives of the people.

There is no assurance that city council, members of which may be directly susceptible to sometimes subtle and substantial pressures of the developer, will make a final rezoning decision compatible with the traditional technical requirements as well as the dual standards of reasonableness and relation to the health, safety, morals and general welfare of the community. Indeed, the very reason the Eastlake Charter Amendment was adopted by initiative petition of the electors of the City of Eastlake was the distrust of the decision of the city council on the Respondent's application which constituted spot zoning and created an apartment oasis between industrial and business zoned property.

A substantial number of the 10,000 reported zoning cases brought in state courts after *Ambler* have involved factual determinations, on a case by case basis, where city council has not acted reasonably and in violation of the standards and safeguards of *Ambler*. The very reason for the concept of referendum was to reserve to the people the final decision on legislative matters and to counterbalance the special interest groups who may exert pressures to influence the vote of the elected representatives in such a manner that the best interest of the community as a whole would not be of prime consideration.

City Council in actual practice could, by the process of final power of change, emasculate a comprehensive community zone plan previously adopted by a vote of the people, who would be powerless in such a case. Change may be initiated by Council as well as by application of individual property owners. While Respondents would suggest the remedy of change of Council, the entrenchment of in-

cumbents may, as a practical matter, preclude such a remedy.

Respondent and amici do not challenge the general constitutional and charter reservation of the power to the people. No constitutional exception of such power is made concerning rezoning of property as distinguished from any other exercise of the police power.

If the people choose, as did the people of the City of Eastlake, to retain final power by the device of automatic referendum, to restrict the final decision making power of its council on matters concerning rezoning of property, in which all share a substantial interest in the future development of their community, then they have the legal and constitutional right to do so.

## V. THERE IS NO EVIDENCE OR RECORD IN THIS CASE TO SUBSTANTIATE THE CLAIM THAT THE EASTLAKE ZONING PROCEDURE IS DISCRIMINATORY OR AN UNFAIR PROCESS.

As stated by Respondent, the challenge involves the unconstitutionality on its face, of the so-called mandatory referendum requirement of the Eastlake zoning process (Br. of Res. 3).

It is once again emphasized and conceded that if, in the application of the Eastlake zoning procedure, unreasonable or arbitrary restrictions are finally placed on any individual property, then recourse may be made to the Courts for a judicial determination under the standards of *Ambler*. Or if in the exercise of such voting rights, it can be demonstrated that the voters acted in such a manner as "to exclude, to build walls against the ills, poverty, racial strife, and the people themselves of our urban areas * * *" (Br. of Res. 18), then the actions of the voters may be



subjected to judicial scrutiny but only in the context of each specific decision.[7]

The Eastlake zoning procedure itself, which is under attack in this case, has fair and equal application to all and is not dedicated to unfairness or discrimination as advanced by Respondent and amici. The same neutral and democratic referendum procedure, as provided for by the Eastlake Charter, was considered by this Court in *James v. Valtierra*, 402 U.S. 137 (1971) to "demonstrate devotion to democracy, not to bias, discrimination, or prejudice."

## VI. ANSWER TO NEW MATERIAL CONTAINED IN BRIEFS OF AMICI CURIAE.

The contention of the amicus *State of Ohio*, that should this Court determine the Eastlake Charter does not violate the due process clause of the Federal Constitution, then the case should be returned to the Ohio Supreme Court for further deliberation, is without merit (Ohio Amicus Br. 5, 10).

The Court below has had adequate opportunity to find the Eastlake Charter provision violated the Ohio Constitution or general law and it did not so find. Certainly, if local infirmities were determined, the Court below would not have decided the case on a Federal Constitutional basis. The Court below specifically found the rezoning action of the Eastlake Council to Respondent's property to be a legislative act under the substantive law of the State of Ohio and as such, subject to referendum.

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7. If apportioning state sovereignty *via* the referendum makes it more difficult for a particular group to obtain advantages, that apportionment is not constitutionally vulnerable, at least so long as it is based on neutral principles and not to achieve racial discrimination. *Spaulding v. Blair*, 403 F.2d 862 (1968); *Ranjel v. City of Lansing*, 417 F.2d 321 (1969), *cert. den.* 397 U.S. 980; *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291 (1970).

Amici *San Diego Building Contractors, et al.*, have based their brief on the issues in the *San Diego* case[8] and the proposition that due process of law requires notice and hearing before a responsible legislative body as a condition to rezoning and that the mandatory referendum procedure denies due process. Such argument ignores the notice and the hearing applicant receives at both the planning commission and city council levels in the Eastlake rezoning procedure and ignores the fact that notice and hearing are not a prerequisite where the referendum vote of the community as a whole is involved.[9]

The facts of the *San Diego* case differ from the within case as the rezoning issue in *San Diego* was submitted by initiative referendum for a vote of the people without prior hearing and determination before the Planning Commission and City Council. Unlike the *San Diego* case, hearings regarding the rezoning of Respondent's property were held before the municipal planning commission and city council in which individual owners of the affected property were given opportunity to be heard and present their views and were then afforded reasonable notice and a meaningful hearing before responsible municipal bodies in the Eastlake rezoning process.

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8. *San Diego Building Contractors Ass'n v. City Council of the City of San Diego*, 13 Cal. 3d 205 (1974) (appeal pending, No. 74-1459).

9. The California Supreme Court in the *San Diego* case, *supra*, concluded that initiative zoning legislation, as all other legislation, may be constitutionally enacted without giving all affected individuals notice and hearing. Referendum, by comparison, has been held in California to be constitutional since the referendum election occurs *after* the adoption of the ordinance to be voted upon and *after* the property owner has had his notice and hearing. *Johnston v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71; *Hurst v. City of Burlington*, 207 Cal. 134, 277 P. 308; *Dwyer v. City Council*, 200 Cal. 505, 253 P. 932; *Taschnei v. City Council*, 31 Cal. App. 3d 48.



The portion of the argument contained in the amici brief of the *National Association of Home Builders, et al.*, that when a city council acts upon a rezoning request, it is engaged in an adjudicatory process, or an administrative determination, and that such determinations are not subject to referendum, is foreclosed in the present case as the rezoning of Respondent's property, under the substantive law of the State of Ohio, was specifically found by the Ohio Supreme Court below to be a legislative act and, as such, subject to referendum (Pet. for Cert. 16).

In further answer to the summary argument contained in the brief of amici curiae *National Association of Home Builders, et al.*, that the comprehensive plan is the essence of zoning and that decisions which amend or change existing zoning require a balance between individual rights and the public welfare, it should be noted, as previously stated, that there is no claim made that the comprehensive zoning plan of the City of Eastlake does not make adequate provision for multiple housing, or that it is good city planning to allow applicant's request for spot rezoning of its property to multiple family use.

## CONCLUSION

It can only be concluded that the Eastlake zoning process, which contains procedural safeguards and standards and is of fair and equal application to all, and being a democratic decision making procedure in matters of great concern which will affect the future development of the community as a whole, does not violate due process, and is a valid constitutional reservation of power by the people to the people over the legislative acts of their elected city council.

The function of the judiciary should be limited to a consideration of the result of the community's referendum decision to determine whether such community decision violates reasonable standards of land use.

The constitutional validity of the mandatory referendum procedure provided for by Section 3, Article VIII of the Charter of the City of Eastlake, should be sustained.

Respectfully submitted,

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# APPENDIX

Form No. 127 Prescribed by Secretary of State Rev. 9-68 Form No. 10037

## CERTIFICATE OF RESULT OF ELECTION ON QUESTION OR ISSUE

Revised Code, Section 3501.11

State of Ohio
County of Lake

*The Board of Elections of* LAKE *County hereby certifies that at the election held in* EASTLAKE CITY (Subdivisions) *in said county on* May 8, 1973 (Date of election) *the vote cast on the following issue was as follows:*

*Issue* PROPOSED ORDINANCE: Shall Ordinance No. 1973-7, changing the use of land in the vicinity of the intersection of SR-91 and Curtis Blvd from General Industrial District (M-3 District) to General Business District (B-3 District) be approved?
(Tax levy, bond issue, local option, etc. — describe fully)

| | | |
|---|---|---|
| *Votes* YES (For, yes, etc.—as on ballot) | | 2239 (Number) |
| *Votes* NO (No, against, etc. — as on ballot) | | 633 (Number) |
| *Total vote cast on issue:* | | 2872 (Number) |

*Witness our official signatures at* Painesville, *Ohio in said county, this* 16th *day of* May, 19 73

E. W. Mathews Chairman
Lois Leggett
Thomas F. Sweeney
J. Thomas Dixon

Attest: John W. Lake Clerk

BOARD OF ELECTIONS

Lake County, Ohio

Supreme Court, U. S.
FILED
NOV 25 1975
MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

**October Term, 1975**
**No. 74-1563**

THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF OF AMICI CURIAE, CITIES OF GARFIELD HEIGHTS, HIGHLAND HEIGHTS, MIDDLEBURG HEIGHTS, OLMSTED FALLS, PARMA, AND SEVEN HILLS

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# Supreme Court of the United States

**October Term, 1975**
**No. 74-1563**

THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF OF AMICI CURIAE, CITIES OF GARFIELD HEIGHTS, HIGHLAND HEIGHTS, MIDDLEBURG HEIGHTS, OLMSTED FALLS, PARMA, AND SEVEN HILLS

### INTEREST OF AMICI CURIAE

This *amici curiae* brief is filed, pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States, by the cities of Garfield Heights, Highland Heights, Middleburg Heights, Parma, and Seven Hills, which are political subdivisions of the State of Ohio, and it is sponsored by the authorized law officer of each of these municipalities, as listed on the inside of the front cover.[1]

1. At the time this brief was being written, there were several other communities in the process of passing legislation authorizing sponsorship, but the legislative process had not been completed by the printer's deadline and so they could not be listed.

Each of the *amici curiae* is vitally interested in this litigation because each of them adopted, by vote of the people, a charter provision or ordinance similar to the charter provision of the petitioner, the City of Eastlake, which reserves to the people the right to approve or reject proposed zoning changes. The City of Parma has an additional vital interest. It has been sued by a builder who purchased a parcel of property which is zoned for single-family residences and wants the property rezoned for an office building. His motion for a summary judgment based on the decision below was denied by the Court of Common Pleas, and that suit is pending. The decision of this Court in the case at bar will determine whether or not Parma's mandatory-referendum ordinance will be sustained.

*Amici Curiae* regard the referendum requirement in a positive light. It represents the expressed desire of Americans to engage in popular democracy. It makes effective the concept that government in this land is truly of, by, and for the people who desire to participate in the making and unmaking of the laws which affect the very quality of their lives.

## ARGUMENT

### The Decision of the Ohio Supreme Court Denies the Cherished Right to Vote

This is a voting-rights case. As unanimously held in *Louisiana v. United States*, 380 U.S. 145, 153 (1965), it is the "cherished right of people in a country like ours to vote." The right to vote is of the essence of a democratic society and that right is fundamental because it is preservative of all rights. *Harman v. Forssenius*, 380 U.S. 528, 537



(1965). Other rights, even the most basic, are illusory if the right to vote is undermined. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Undeniably, the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. A consistent line of decisions by this Court in cases involving the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally-protected right to vote, and history has seen a continuing expansion of the scope of the right of suffrage in this country. *Reynolds v. Sims*, 377 U.S. 533, 554-555 (1964).

Provisions for mandatory referendums on zoning matters demonstrate devotion to democracy. This procedure ensures that all the people of a community will have a voice in democratic decisionmaking that will affect the future development of their own community. *James v. Valtierra*, 402 U.S. 137, 141 (1971).

By overturning the mandatory-referendum provision of the City of Eastlake's Charter, the Supreme Court of Ohio denied the people's cherished, constitutionally-protected right to vote. Despite the fact that rights guaranteed by the federal Constitution, such as the right to vote, are protected against deprivation by the states through operation of the Due Process Clause of the Fourteenth Amendment, the Court below based its erroneous decision on that very clause.

### Historically, Referendum Requirement Responded to Abuse of Representative Government

In the latter part of the Nineteenth Century, there was popular discontent with abuses committed by state legislatures which succumbed to the pressures of political

bosses and corporate magnates and passed legislation for the benefit of a variety of franchise hunters, building contractors, and other special interest groups.[2] In reaction, two popular movements arose to restore government to the people: municipal home rule and initiative and referendum. During the Progressive Era in the first part of this century, a number of states adopted these measures. By popular vote they were incorporated into the Constitution of Ohio in 1912.

On March 12, 1912, William Jennings Bryan addressed the Constitutional Convention of Ohio and urged adoption of the initiative and referendum provisions for submission to the people:

> The initiative and referendum do not overthrow representative government—they have not come to destroy but to fulfill. The purpose of representative government is to represent, and that purpose fails when representatives mis-represent their constituents. Experience has shown that the defects of our government are not in the people themselves, but in those who, acting as representatives of the people, embezzle power and turn to their own advantage the authority given them for the advancement of the public welfare. It has cost centuries to secure popular government; the blood of millions of the best and the bravest has been poured out to establish the doctrine that governments derive their just powers from the consent of the governed.
>
> All this struggle, all this sacrifice, has been in vain if, when we secure a representative government,

2. Lewis Jerome Johnson, *The Initiative and Referendum—An Effective Ally Representative Government*, 40 NEW ENGLAND MAGAZINE 405 (1909); George W. Guthrie, *The Initiative, Referendum and Recall*, 43 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 17 (1912).



> the people's representatives can betray them with impunity and mock their constituents while they draw salaries from the public treasury.[3]

During the debate on the proposal, delegate Fackler noted how the opponents were "always sparring in order that they might not be placed in a position of not having faith in popular government, but in fact trying to find some other ground on which they can hang an objection to the measure." He responded to one of the charges of the opponents, that the right to referendum would bring about the destruction of representative government, by showing it was unsound to argue that the placing of the check and balance of the initiative and referendum upon representative government would be destructive of it. "You do not destroy the power of an agent when you reserve a right to veto his action, or when you keep the right to go in and do what he has failed to do."[4]

Thus, the majority of the Supreme Court of Ohio made its erroneous decision because it failed to comprehend that there is no "unlawful delegation of legislative power" when the people vote in a referendum election, for they have expressly reserved to themselves that right in the State's fundamental law—the Constitution of Ohio. A municipal charter provision or ordinance reserving to the people of a community the right to a referendum on any legislation deemed necessary gives expression to the right of self-government; that is, a government of the people, functioning for the people (rather than for special interests)

3. Vol. I Proceedings and Debates of the Constitutional Convention of the State of Ohio 664 (1912); see also the article by Robert Crosser, Chairman of the Committee on the Initiative and Referendum, in 43 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 191 (1912) entitled *The Initiative and Referendum Amendments in the Proposed Ohio Constitution.*

4. Proceedings and Debates at 736.

precisely because it is government by the people. As stated by one of the ardent advocates of referendums, George W. Guthrie, a former Mayor of Pittsburgh:

> There can be no order and stability in any community, no civilization worthy of the name, unless the law gives expression to the ideals and collective will of the people, and its administration commands their respect.[5]

**Referendum Is Essential to Maintenance of People's Power**

Article I, § 2 of the Constitution of the State of Ohio declares that "All political power is inherent in the people", and Article II, § 1 f provides that "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action . . ."

In fashioning its denial to the people of their cherished right to vote in referendums on local zoning ordinances, the Supreme Court of Ohio resurrected the discredited concept of "substantive due process",[6] without mentioning it by name. The majority simply did not like the idea of the referendum requirement, but could find no State precedent for declaring it unconstitutional. The trial court, three Court of Appeals judges, and two dissenting Supreme Court judges found no constitutional infirmity.

In *The Cincinnati, Wilmington and Zanesville Railroad Company v. The Commissioners of Clinton County* (1852), 1 Ohio St. 77, 86, the Ohio Supreme Court recog-

5. Guthrie, *supra*, note 2.

6. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).



nized the right of the people to reassume all or any part of delegated legislative power. "The people have thus granted certain political powers, to be exercised for their benefit, until they see fit to resume them, and have retained others."

Seventy years later, the Court spoke in terms of agency with respect to delegated legislative power: "The people who delegated that power did not make an exclusive grant . . . the powers of the creature cannot under any circumstances rise above those of its creator, the sovereign people who gave it being. The power of an agent cannot be greater than that of the principal." *Allen v. Scott* (1922), 104 Ohio St. 436, 443.

A unanimous Court in *The State, ex rel. City of Middletown v. City Commission of City of Middletown* (1942), 140 Ohio St. 368, 375, held that "The provisions of the Constitution authorizing a referendum should be so construed as to permit rather than preclude the exercise of the right conferred. The object clearly sought to be attained should be promoted rather than prevented or obstructed."

At the same time the people of Ohio amended their Constitution to reserve for themselves the right of initiative and referendum, they also adopted Article XVIII, § 3 of the Constitution which provides that "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Hence, there is express constitutional authority for the people of Ohio communities to subject all municipal zoning regulations to a mandatory referendum prior to becoming effective.

Moreover, "It is the policy of our government, federal and state, to at all times enlarge the powers of the people in matters of local self-government, rather than restrict them." *City of Youngstown v. Craver* (1933), 127 Ohio St. 195, 201.

"The right of referendum with respect to zoning ordinances is essential for the rights of the electors of each city. A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance." *Johnston v. City of Claremont,* 49 Cal. 2d 826, 837, 323 P.2d 71 (1958).

As urbanization increases, institutions of local government, which have always been a major aspect of our system, and their responsible and responsive operation "is today of increasing importance to the quality of life of more and more of our citizens". *Avery v. Midland County, Texas,* 390 U.S. 474, 481 (1968).

**Mandatory Referendum Insures Responsible and Responsive Operation of Local Government**

It is to insure the "responsible and responsive operation" of local government that the people have turned to the mandatory referendum requirement. In Ohio, ordinances which are passed with an "emergency clause"[7] are not subject to a referendum initiated by petition.[8] Thus, it is possible for the legislative authority to prevent an optional referendum on a zoning ordinance by the device of passing it as an "emergency ordinance". Timing the passage of the ordinance is another method of effectively defeating an optional referendum. For example, it would be practically impossible to prepare, circulate, and obtain the required number of signatures during the holiday season between Thanksgiving and New Years, or during the vacation month of August, especially if the rezoning has been passed "quietly" with little or no publicity so that an interested homeowners' group would learn of the passage too late to meet the stringent statutory time requirement.[9]

7. Section 731.30 of the Ohio Revised Code.

8. *State ex rel. Fostoria v. King* (1950), 154 Ohio St. 213; *Partain v. Brooklyn* (1956), 101 Ohio App. 279.



As the popular movement for initiative and referendum at the turn of this century was in part a response to the felt-need to return government to the people, from the control of political bosses and special interests, so too the passage of mandatory referendum requirements was in part engendered by a similar felt-need. Aggressive land speculators and promoters, generally nonresidents of the community, have obtained zoning changes profitable to them, but the long-term consequences are being borne by the people who are the permanent residents of the community, and who have made the largest investment of their lives in their homes. Homeowners' associations have proliferated as it became apparent there was a need for collective action to protect the homeowners' substantial investment of money, time, and energy in their homes. They perceived a threat to the quality of life they desired, from speculators and promoters, and while they accepted the concept (expressed in the slogan made popular by the governor) that "profit is not a dirty word in Ohio", they recognized that the profit should not be their loss or detrimental to their interests.

For example, it is not uncommon for people to purchase a home in a new residential development only to find a short time later that the view, which in part enticed

9. Section 731.29 of the Ohio Revised Code.

them to purchase the home, is now being obstructed by high-rise apartments on nearby land formerly also restricted for single-family homes but later rezoned for apartments. The apartments always seem to come in after the homes are built. They are not built first with the single-family development coming later.

As this Court so aptly phrased it in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 394-395 (1926), the coming of apartment houses has sometimes resulted in destroying the entire section for private home purposes. The apartments become mere parasites, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district, and bring other undesirable consequences, so that under these circumstances "apartment houses, which in a different environment would not only be unobjectionable but highly desirable, come very near to being nuisances."

Spot zoning changes have a way of engendering others, frequently for the same promoters and speculators. An inducement for the rezoning, often heard, is that the changed use will generate more real estate taxes for the community, and that has an appeal—until the knowledge becomes general that property-value reductions are soon granted to the promoters while homeowners' taxes keep rising. Many times, what has been actually built is a far cry from the artists' renderings submitted to municipal officials to induce the zoning changes.

**Court Incompetent to Inquire Into Motive of Voters**

It was not the single motive to exclude, or resistance to change, that has produced the mandatory referendum requirement—as is the myopic and cynical viewpoint, unsupported by the record, of the concurring opinion below.



There are sound and practical reasons for insuring that the people will have the final word on zoning, in partnership with their elected officials, to see that the promoters' promises are kept and deviations from the master plan are minimized and made only for good cause.

What we are dealing with here is the constitutional right to vote in referendum elections—the exercise of the people's reserved right to approve or disapprove local regulations. Thus, it was beyond the competence of the judges joining in the concurring opinion below, the majority of the Court, to probe the collective minds of the voters. As was succinctly and well-stated in *Ranjel v. City of Lansing*, 417 F.2d 321, 324 (6th Cir. 1969), *cert. denied* 397 U.S. 980, *rehearing denied* 397 U.S. 1059 (1970), "if the electors had a legal right to a referendum, their motive in exercising that right was immaterial." It is a familiar principle of constitutional law that this Court will not strike down otherwise constitutional legislation on the basis of an alleged illicit legislative motive. *United States v. O'Brien*, 391 U.S. 367 (1968).

"The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States*, 195 U.S. 27, 56 (1904).

"A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker* [348 U.S. 26]. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for

people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

When a community plans one area for industrial use, another for apartments, and so forth, it is a community-wide concern if apartments are allowed to intrude into the industrial zone, for a precedent is set for requests to allow other instrusions into the other areas. Homeowners are naturally concerned that they not jeopardize residential districts. There is nothing untoward or violative of anyone's due process rights to have the mass of people most affected by zoning changes share in the decisionmaking process with elected officials. Officials imbued with the democratic spirit and perceiving their agency relationship with their principals—the voters—lose no self-esteem in submitting to the final decision of the people.

Since "there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empowers the Court to nullify the deliberate choices of the elected representatives of the people",[10] the Due Process Clause does not empower the Supreme Court of Ohio to nullify the deliberate choices of the people themselves, in whom all political power is inherent.

It is obvious from reading the majority and concurring opinions below that the majority of the court misconceived the role of the people in the democratic process and lacked faith in the people's ability to make responsible decisions in matters of vital concern to them. They foreclosed the people's right to vote on zoning matters because of fear and distrust of the way they may vote.

But, in *Carrington v. Rash*, 380 U.S. 89, 94 (1965) this Court held that:

10. *Labine v. Vincent*, 401 U.S. 532, 539-40 (1971).



> 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '(T)he exercise of rights so vital to the maintenance of democratic institutions,' *Schneider v. State*, 308 U.S. 147, 161, 60 S. Ct. 146, 151, 84 L.Ed. 155, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.

If it is constitutionally impermissible to deny the vote to a sector of the population because of the way they may vote, the entire community should not be disenfranchised because five judges question the voters' sense of responsibility or motives. Neither the Due Process Clause of the Fourteenth Amendment nor any other provision of the Constitution justifies denial of the cherished right to vote on such a negative perception of participatory democracy.

"Democracy is a very simple principle, and those who speculate about its meaning are those who are not quite willing to accept it. The dictionary defines it as 'the rule of the people'. Not much more need be said about it."[11]

### "Consent" Cases Inapplicable

In the dissenting opinion below, Judge Corrigan persuasively distinguished the "consent requirement" cases from this voting-rights litigation. Although each of the three cases discussed in the majority opinion can be further distinguished from this litigation on their facts, *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917) is more analogous to the case at bar than is either *Eubank v. City of Richmond*, 226 U.S. 137 (1912), or *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928), on which the majority opinion was predicated.

11. Introduction to BERNARD SMITH, THE DEMOCRATIC SPIRIT, at XXV-XXVI (New York: Alfred A. Knopf, 1941).

Both Forest City Enterprises and Thomas Cusack Co. acquired property subject to existing prohibitions and restrictions, and both wanted to build something not permitted. *Cusack* held that permitting neighboring lot owners to consent to the removal of a restriction was constitutionally permissible. "This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances." 242 U.S. at 531.

Thus, the "consent" cases distinguish between an ordinance permitting neighbors to remove a land-use restriction and an ordinance permitting neighbors to impose one. The question decided by the Eastlake referendum was whether to approve a rezoning ordinance which would have removed a restriction against the type of building Forest City wanted to construct. The holding of the Ohio Supreme Court that this constituted an unlawful delegation of legislative power is not tenable.

A similar contention, likewise predicated on *Eubank* and *Roberge*, was rejected in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 194 (1936). Here, also, as in that case, the restriction was already imposed with the knowledge of Forest City, and the restriction "ran with the acquisition and conditioned it."

Conditioning or withholding operation of legislation unless there is a favorable vote in a referendum election is a condition frequently found in police regulations, and it is also found in Congressional enactments held to be constitutional by this Court; *See, e.g., Currin v. Wallace,* 306 U.S. 1, 15 (1939).

Nor is the Eastlake type of mandatory referendum unique in Ohio. Article II, §30 of the Constitution, requires that any proposal to alter county boundary lines



must be approved in a mandatory referendum election. Article XVIII, §8 prescribes such an election in order to set up a municipal charter commission, and another election to approve the charter it drafts. Mandatory referendums are required for such diverse purposes as adoption of zoning in counties and townships;[12] the issuance of bonds for bridge reconstruction;[13] emergency school repair;[14] participation in federal aid programs;[15] the creation of a regional transit authority;[16] authority to tax for support of such an authority;[17] raising the limit on a municipal income tax;[18] creation of a soil and water conservation district;[19] and approval of taxes in excess of the 10-mill limitation.[20]

Moreover, any land owner has ample remedies, both administrative and judicial, if it is claimed that a zoning classification as applied to a particular parcel of land is unreasonable, arbitrary, or confiscatory. *Driscoll v. Austintown Associates* (1975), 42 Ohio St. 263.

A referendum "is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." *Southern Alameda Spanish Speaking Organization v. Union City,* 424 F.2d 291, 294 (9th Cir. 1970).

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12. Ohio Revised Code, §§ 303.11, 519.11.

13. *Ibid.*, § 133.16 (60% favorable vote required at a special election).

14. *Id.*, § 133.17.

15. *Id.*, § 139.02 (65% required).

16. *Id.*, § 306.32.

17. *Id.*, § 306.49.

18. *Id.*, § 718.01.

19. *Id.*, § 1515.04 (65% required).

20. *Id.*, § 5705.19 (55% required at a special election).

## CONCLUSION

Among the most preferred constitutional rights is the cherished right to vote. It is of the essence of a democratic society and fundamental because preservative of all rights. A consistent line of decisions by this Court in cases involving the right of suffrage has made it indelibly clear that the Constitution of the United States protects the right of all qualified citizens to vote in local as well as state and federal elections.

Provisions for referendums resulted from the felt-need of the people to reserve to themselves a portion of the legislative power, while delegating the greater part to their representatives as agents of the people. Since zoning ordinances have a more direct and lasting effect upon property values and property owners than almost any other type of ordinance, reservation of the right of referendum with respect to zoning is essential to preserve and protect their rights. Thus, provisions for mandatory referendums on zoning matters demonstrate devotion to democracy and ensure that all the people of a community will have a voice in democratic decisionmaking that will affect the future development of their own community.

Such mandatory-referendum provisions can hardly be an "unlawful delegation of legislative power", as the Court below held, since all political power is inherent in the people who delegate such share as they desire to their representatives and reserve to themselves the portion they desire to retain. Moreover, it is the traditional right of the voters through the direct-legislation, mandatory-referendum procedure to approve or override the views of their elected representatives as to what serves the public interest. There is no violation of the Due Process Clause in this democratic decisionmaking process.



It is therefore respectfully submitted that the decision of the Supreme Court of Ohio was clearly erroneous and should be reversed.

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In the

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 74-1563**

CITY OF EASTLAKE, et al.,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

On Writ of Certiorari to the
Supreme Court of Ohio

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In the

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 74-1563**

CITY OF EASTLAKE, et al.,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

On Writ of Certiorari to the
Supreme Court of Ohio

## Brief of Amicus Curiae State of California

### JURISDICTIONAL STATEMENT

Pursuant to 28 U. S. C. § 1257(3), this Honorable Court has granted a petition for a writ of certiorari to review a decision of the Supreme Court of the State of Ohio. This amicus curiae brief is respectfully submitted by the State of California, pursuant to Rule 42(4) of this Honorable Court, by and through its Attorney General, and acting at the request of the California Coastal Zone Conservation Commission.[1]

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1. The California Coastal Zone Conservation Commission is a governmental agency of the State of California, established by an initiative enacted by the People of California on November 7, 1972. California Public Resources Code, §§ 27000 *et seq.* Its purpose is to adopt a comprehensive plan for the permanent protection of the resources of the California coastal zone, and, during the interim period required for the formulation of such a plan, to protect those resources by means of an extensive permit system. The adoption by initiative of the California Coastal Zone Conservation Act has been upheld against constitutional attack. ***CEEED v. California Coastal Zone Conservation Commission,*** 43 Cal. App. 3d 306 (1974).

## INTEREST OF THE STATE OF CALIFORNIA

The California Constitution, Article IV, section 1, provides:

> "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

Article IV, section 25, of the California Constitution further provides:

> "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. This section does not affect a city having a charter."

Thus, under California law, the powers of referendum and initiative are powers reserved by the people from the legislative authority generally delegated to their elected representatives; this reservation of powers applies not only to state statutes, but also to ordinances of cities and counties.[2]

The decision below, 41 Ohio St. 2d 187, 324 N. E. 2d 740, holding that a municipal charter provision requiring a mandatory referendum on each change in the municipality's zoning ordinance constituted an unconstitutional delega-

2. The California Constitutional sections were enacted by the People of California at the election of November 8, 1966. Their predecessor section (former California Constitution, Article IV, section 1), insofar as it pertained to the initiative and referendum powers, was added in 1911, as part of the Progressive reform program of the early 1900's. The original California Constitution of 1849, Article VIII, had also contained a referendum provision. See generally, Crouch, *The Initiative and Referendum in California* (1950).

The language of Article IV, section 25, has not been interpreted to mean that the electors of a California charter city do not have the powers of initiative and referendum. Rather, it has been read to mean that a charter may add to the power reserved by the Constitution, but may not lessen it. *Hunt v. Mayor and Council of The City of Riverside,* 31 Cal. 2d 619, 622-623 (1948).



tion of legislative power threatens to undermine these provisions of the California Constitution, provisions which the Court has previously recognized as embodying a "devotion to democracy." *James v. Valtierra,* 402 U.S. 137 (1971). For that reason, California files this amicus curiae brief in support of petitioner City of Eastlake.

### I. A Provision of a City Charter Providing for an Automatic Referendum on any Change in a Comprehensive Zoning Plan Does Not Constitute an Unlawful Delegation of Legislative Power to the People of the City.

A.

The Ohio Supreme Court concluded that the charter provision of the City of Eastlake which provides for an automatic referendum on any legislative change in a comprehensive zoning plan constituted an unlawful delegation of the legislative power of the City to the People of the City, and therefore violated the Fourteenth Amendment of the United States Constitution. 41 Ohio St. 2d at p. 198. In reaching this conclusion, the Ohio Court relied on two inapposite decisions of this Court, and distinguished both *Thomas Cusack Co. v. Chicago,* 242 U. S. 526 (1917), and the more recent decision of *James v. Valtierra, supra,* 402 U. S. 137. As we shall explain below, the decisions upon which the Ohio Court relied are inapposite, since they deal not with City-wide referenda, but with limited "expression[s] of neighborhood preference for restraints . . . ." *Southern Alameda Span. Sp. Org. v. City of Union City,* 424 F.2d 291 (9th Cir. 1970). Moreover, even if such cases are pertinent here, the Court's decision in *Thomas Cusack Co. v. Chicago, supra,* upholding a neighborhood consent requirement, is controlling. More importantly, however, the Court's decision in *James v. Valtierra, supra,* expressly dealing with the power of referendum, is determinative.

In invalidating the Eastlake Charter provision, the Ohio Court relied upon *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U. S. 116 (1928) and *Eubank v. City of Richmond,* 226 U. S. 137 (1912). *Roberge* involved a Seattle ordinance permitting the construction of a philanthropic home, but requiring in addition the consent of the owners of two-thirds of the property within four hundred feet of the proposed building. *Eubank* considered the validity of a Richmond ordinance requiring a committee on streets to establish a building setback line for all of the buildings on a particular block, whenever two-thirds of the property owners of the block so requested. Each case thus dealt only with the expression of particular neighborhood interests; each ordinance legalized only a neighborhood preference, without reference to whether that preference would in fact best serve the public interest of the city as a whole. Thus, neither case is determinative of the validity of a referendum in which the electorate of an entire city participate.

Even if such non-referendum cases are pertinent here, moreover, *Thomas Cusack Co. v. Chicago, supra,* 242 U. S. 526 (1917), is controlling. *Cusack* upheld a Chicago ordinance which prohibited the erection of any billboard in a residential block, unless consent was first obtained from a majority of the owners of property fronting on the block. *Cusack* thus establishes the validity of a procedure by which a reasonable prohibition on use may be altered by those directly affected by the proposed use. *Accord: In re Petersen,* 51 Cal. 2d 177 (1958).

If such neighborhood consent requirements can be analogized to city-wide referenda, the holding of *Cusack* must apply here. Forest City Enterprises held its property subject to the limited industrial use designation imposed by the zoning ordinances of Eastlake. Like the consent sought



by Cusack Company, Forest City Enterprises sought to have the prohibitions imposed by the limited industrial use designation altered, by applying for rezoning of its property to a multi-family high-rise designation. The "consent" required by the City of Eastlake for the alteration of the previous restriction, however, was not only approval by the City, but also by its electorate. Thus, similar to *Cusack,* Forest City Enterprises sought only an alteration of a previously established reasonable prohibition. Unlike both *Roberge* and *Eubank,* however, the action of the People in rejecting that alteration could not result in an unreasonable action, since the effect of such a rejection would be only to leave in effect a previously adopted zoning measure of the Eastlake City Council. Particularly pertinent here is the observation of the Ohio Court that Forest City Enterprises did "not claim[ ], nor does the record indicate, that the zoning of [Forest City Enterprise's] 8-acre parcel for industrial use is unreasonable and unconstitutional." 41 Ohio St. 2d at p. 191. Accordingly, if any of the cases discussed by the Ohio Court are of any significance here, it is *Cusack* that is controlling.

In our view, however, these cases dealing with "ambiguously founded neighborhood preference[s]" are completely inapposite to the right of referendum, "an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." *Southern Alameda Span. Sp. Org. v. City of Union City, supra,* 424 F. 2d 291, 294. They do not serve as precedent for consideration of a legislative scheme for referenda on zoning changes which merely "ensures that *all* the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public

services . . . [and which] gives them a voice in decisions that will affect the future development of their own community." *James v. Valtierra, supra,* 402 U. S. 137, 143 (emphasis added). On this point, *James v. Valtierra, supra,* is dispositive. The Court there upheld a California referendum procedure for governmental decisions concerning low-rent housing projects, against equal protection claims, and the analysis undertaken by the Court is applicable here.

The Ohio Court nonetheless purported to distinguish *Valtierra* on several grounds. It first noted that the referendum provision there involved did not concern zoning, but rather the approval or disapproval of low-rent housing. Second, it noted this Court's emphasis on the community interest in participating in governmental decisions which might lead to large expenditures of local governmental funds for increased public services.

The first ground relied upon by the Ohio Court ignores the very purpose for which Forest City Enterprises sought rezoning—to construct multi-family, high-rise apartments. The second ground, moreover, ignores the reality that the rezoning sought by Forest City Enterprises and subsequent construction under the new designation could have exactly the same effect as the low-rent housing in *Valtierra:* increased traffic, an increased burden on schools and public utilities, as well as an alteration of the physical and social characteristics of the neighborhood. As the California Supreme Court has noted in a similar case:

> "The right of referendum with respect to zoning ordinances is essential for the protection of the rights of the electors of each city. A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance. What is done



> with respect to one piece of property of necessity has an effect, good or bad, upon adjacent or nearby property." *Johnston v. City of Claremont,* 49 Cal. 2d 826, 837 (1958).

For these reasons, we believe that *James v. Valtierra* is controlling here.

B.

Even apart from the cases discussed above, there is a more fundamental reason why the Ohio Court incorrectly concluded that the Eastlake referendum procedure constituted an unlawful delegation of legislative power: the People are, of course, the ultimate repository of legislative power. The powers of referendum and initiative are powers reserved and retained by the People, and not the exercise of rights granted to them. Any legislative body, whether it be municipal, state or federal, draws its authority to legislate only from a delegation of power from the People to their elected representatives. *Federalist Papers,* No. 39; *Ley v. Dominguez,* 212 Cal. 587, 593 (1931); *Dwyer v. City Council,* 200 Cal. 505, 513 (1927). A conclusion that a referendum is an unlawful delegation of legislative power is thus not only a complete *non sequitur,* but also a perversion of the touchstone of the American political system that all power is inherent in the People.

The Ohio Constitution, like the California constitution,[3] specifically provides that the powers of initiative and ref-

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3. Article II, section 1f of the Ohio Constitution provides, in pertinent part:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action . . . ."

Article IV, section 25 of the California Constitution provides in pertinent part:

> "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide . . . ." See also fn. 2, *ante.*

erendum are reserved to the People of each municipality. There thus can be no question here of an unlawful delegation of legislative power; by the enactment of the pertinent provisions of the Eastlake Charter, the Eastlake electorate has simply withdrawn from the legislative body, and reserved to themselves, the right to exercise a part of their inherent legislative power.

These principles have been long recognized by this Court. In *Pacific States Telephone and Telegraph Co. v. Oregon,* 223 U. S. 118 (1912) and *Kiernan v. Portland,* 223 U. S. 151 (1912), the Court considered challenges to the initiative and referendum powers exercised, respectively, by a state and by a municipality. The Court concluded "the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental . . . ." (223 U. S. at p. 151), and that accordingly the court lacked jurisdiction over the claim. See also *Highland Farms Dairy v. Agnew,* 300 U. S. 608, 612 (1937); *Davis v. Ohio,* 241 U. S. 565 (1916); and *Hunter v. Erickson,* 393 U. S. 385, 393-396 (1969) (concurring opinion). Indeed, in the *Highland Farms Dairy* case, the Court noted that "[t]he Constitution of the United States in the circumstances here exhibited has no voice upon the subject." *Accord: Ranjel v. Lansing,* 417 F. 2d 321, *cert. den.* 397 U. S. 980 (6th Cir. 1969); *Spaulding v. Blair,* 403 F.2d 862 (4th Cir. 1968). As a result, the determination of both the Constitution of Ohio and the Charter of the City of Eastlake that the People retained the right of referendum is purely a political question; it does not constitute an unconstitutional delegation of legislative power to the People.

C.

Several further factors involved in the Eastlake Charter procedure appear to have contributed to the decision of



the Ohio Court. The Court first noted that the referendum procedure provided "no assurance that the result reached thereby would be reasonable or rational." 41 Ohio St. 2d at p. 196. Second, the Court declared that "[i]t can scarcely be contended that every proposed land use change, no matter how small, in a city with a population of 20,000, either involves or allows community-wide policy-making." 41 Ohio St. 2d at p. 197. Finally, a concurring opinion, in which four of the Ohio justices concurred, attributes motives to the People of Eastlake "to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas." 41 Ohio St. 2d at p. 200. We discuss these factors below.

We fail to see any judicially cognizable difference in the possibility of abuse inherent in the formulation of a particular zoning regulation by either the legislative or referendum process. Neither the referendum nor the legislative process provides complete assurance of reasonable results. In both cases, however, a capricious result is subject to invalidation by the courts. Both methods involve a hearing and determination before the appropriate municipal bodies. If the municipality determines that a change in the existing zoning scheme is warranted, the matter is then set for vote of the People. If the People affirm the decision of their government, the zoning change is validated. If it is rejected, however, the previous zoning change simply remains in effect. The record in this case does not demonstrate that the rejection of Forest City Enterprise's request was unreasonable; even if it did, moreover, the appropriate remedy would be invalidation of the referendum result, rather than emasculation of the democratic process.

The second objection of the Ohio Court ignores the basic function served by a comprehensive zoning plan in guiding

the future growth of a municipality; as the California Supreme Court has noted in another context, zoning and other land use regulation "expresses both a concern for our present quality of life and our collective fiduciary responsibility to the future . . . ." *HFH Ltd. v. Superior Court,* .... Cal. 3d. ...., .... (1975). The restrictions relating to any particular portion of a municipality are an integral part of an entire scheme of community planning, and are the expression of a definite policy. An amendment to a zoning ordinance, however, alters that plan, and, in effect, alters the future course and nature of the community; the change proposed here from industrial to multi-family high-rise demonstrates that principle well, since the future character of the community is affected by that decision.

Even more significantly, however, the contention again overlooks the fact that the referendum procedure interjects a significant constitutional ingredient. Even if it were conceded that the ordinance affected only a small proportion of the electorate of the City, there is nothing inconsistent in permitting the entire electorate to consider it in referendum. Since the legislative body of the City of Eastlake admittedly had authority to enact the ordinance requested by Forest City Enterprises, and since the legislative body exercises only that power derived from the electorate, the alleged character of the ordinance is not of itself sufficient to preclude a referendum by the electorate. *Dwyer v. City Council, supra,* 200 Cal. 505, 513-515.

Finally, the opinion of the concurring justices of the Ohio Court demonstrates a disturbing distrust of the American democratic process and the formulation by the People of their own future. As the City of Eastlake noted in its petition for hearing, the concurring opinion "is a manifestation of a new distrust of democracy and



democratic processes in favor of an elitism that considers itself a wiser guide for the solution of economic and social policies, an elitism contemptuous of the wisdom and fairness of the ordinary voter . . . ." Petition for Writ of Certiorari, p. 11.

This case does not in any manner deal either with an attempt by a municipality to halt all growth within its borders or to regulate growth, pending consideration of its future. *Cf. Construction Industry Association v. Petaluma,* ..... F.2d ..... (9th Cir. 1975). The Eastlake referendum procedure does not involve inherently suspect racial classifications, *cf. Hunter v. Erickson, supra,* 393 U. S. 385 (1969) and *Reitman v. Mulkey,* 387 U. S. 369 (1967), nor does it involve a classification based on wealth. *Cf. James v. Valtierra, supra,* 402 U. S. 137. At the trial below, the matter was submitted for decision only on the admitted portions of the complaint which raised the validity of the Eastlake Charter provision on its face. None of the allegations of the complaint raised the question of racial or wealth classifications. The record likewise fails to demonstrate either that the referendum procedure is designed to exclude low and moderate income housing, or that the effect of its operation has been to create such an exclusion. *Cf. Village of Belle Terre v. Boraas,* 416 U. S. 1, 14 (1974) (dissenting opinion). Under these circumstances, the only permissible conclusion is that the Eastlake provisions for referenda "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra, supra,* 402 U. S. 137, 141.[4]

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4. The Ohio Court did not discuss or utilize the 55% majority requirement of the charter provision as a basis for its holding of unconstitutionality. Given the neutral characteristics of the referendum requirement, the high approval requirement does not constitute an equal protection violation. *Gordon v. Lance,* 403 U. S. 1 (1971).

## CONCLUSION

The decision of the Ohio Court ignores the fundamental principle of the American political system that all political power is inherent in the People, that the People may confer their legislative power upon their elected representatives, but that they retain the ultimate power to review any legislation enacted.

California accordingly joins with Eastlake in urging that the judgment of the Supreme Court of Ohio be reversed.

Respectfully submitted,

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# Supreme Court of the United States

**October Term, 1975**
**No. 74-1563**

THE CITY OF EASTLAKE, *et al.*,
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vs.

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*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF OF AMICI CURIAE CITIES OF EUCLID, KIRTLAND, WILLOUGHBY HILLS, AND WILLOWICK, OHIO

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## BRIEF OF AMICI CURIAE CITIES OF EUCLID, KIRTLAND, WILLOUGHBY HILLS, AND WILLOWICK, OHIO

### INTEREST OF THE CITIES OF EUCLID, KIRTLAND, WILLOUGHBY HILLLS, AND WILLOWICK AS AMICI CURIAE

The cities of Euclid, Kirtland, Willoughby Hills, and Willowick, Ohio, acting by and through their respective Law Directors, submit this brief in support of the petitioner, the City of Eastlake, pursuant to Rule 42.

The City of Euclid is situated in Cuyahoga County and directly adjoins the east side of the City of Cleveland. Kirtland, Willoughby Hills, and Willowick lie further to the east in neighboring Lake County. They fall in the mainstream of Cleveland's rapid eastward expansion. Each is a charter city with broad powers of home rule granted to it under Article XVIII of the Ohio Constitution. Each prides itself on its ability to manage its own affairs while remaining responsive to the needs of the larger community.

Forest City Enterprises, Inc. is one of many large commercial developers who have benefited from the area's growth. It currently has controlling interest in a number of large multi-story apartment complexes in several of these communities. City records show that the apartment buildings accommodate as many as four hundred families, and rents are gauged principally for middle and upper income brackets. The apartments necessarily rely on these cities to provide them with police and fire protection, utility services, highway maintenance, and the other important municipal services.

Under the various zoning plans adopted by each of these communities, and ratified by the voters, the location of apartments has been restricted, and growth has been allowed to progress in an orderly fashion. The voters of Euclid have always been permitted to register their approval or disapproval of changes in zoning through the referendum.[1] Kirtland,[2] Willoughby Hills,[3] and Willowick[4] in recent years have enacted charter provisions similar to that of Eastlake, making a referendum mandatory whenever land use or zoning changes are proposed by their respective municipal councils.

The citizens of these communities value their right to participate in the planning of their communities' future. They therefore join with the City of Eastlake in petitioning this Court to see that this fundamental right is not taken from them.

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1. Art. III, §1, Charter of the City of Euclid, Ohio, as amended (1974).

2. Art. 9, Charter of the City of Kirtland, Ohio, as amended (1973).

3. Art. VI, §6.2, Charter of the City of Willoughby Hills, Ohio, as amended (1973).

4. Art. III, §3.15, Charter of the City of Willowick, Ohio, as amended (1973).



## ARGUMENT

### I. A MUNICIPAL CHARTER AMENDMENT WHICH PROVIDES FOR A MANDATORY REFERENDUM BEFORE ANY ORDINANCE AFFECTING ZONING OR LAND USE BECOMES EFFECTIVE AFFORDS FULL DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION.

The powers of initiative and referendum have been enjoyed by the people of Ohio as a part of their fundamental law since the State's constitution was amended in 1912. OHIO CONST. Art. II, §1f. Ohio does not stand alone in this respect, for these rights are enjoyed by the citizens of almost every state of the union. As this Court correctly observed when it considered the California referendum provision in *James v. Valtierra*, 402 U.S. 137 (1971), "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *Id.* at 141. Nevertheless respondent contends that the City of Eastlake's Charter provision, which requires a referendum of any ordinance that affects zoning or land use, conflicts with the due process requirements of the federal constitution.

There can be little question that the charter provision is valid under Ohio law. Section 1f of Article II of the Ohio Constitution provides:

> The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action . . . .

That zoning is a legislative matter is evident from the decisions of this Court, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954), and has been consistently recognized by the Ohio courts. *Berg v. Struthers*, 176 Ohio St. 146, 198 N.E.2d 48 (1964); *Donnelly v. Fairview Park*, 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968). It is equally clear, as the Ohio Supreme Court noted in its opinion below, that under Ohio law zoning is a proper subject for the referendum process.[5] *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975); *Hilltop Realty v. City of South Euclid*, 110 Ohio App. 535, 164 N.E.2d 180 (1960). Thus, the only question before this Court is whether a mandatory referendum provision vio-

5. It has been widely recognized that zoning measures are a proper subject for referendum procedures. *Jackson v. Denver Producing & Refining Co.*, 96 F.2d 457 (10th Cir. 1938); *Wheelright v. County of Marin*, 2 Cal. 3d 448, 85 Cal. Rptr. 809, 467 P.2d 537 (1970); *Dwyer v. City Council of Berkeley*, 200 Cal. 505, 253 P. 932 (1927); *Reva v. Township of Portage, Kalamazoo County*, 356 Mich. 381, 96 N.W.2d 778 (1959); *State ex rel. Hunzicker v. Pulliam*, 168 Okla. 632, 37 P.2d 417 (1934). *See also*, ANNOT. 122 A.L.R. 769, 789 (1938). Some states have held, however, that the initiative is not available for zoning matters. *See, e.g., Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308 (1929); *State ex rel. Powers v. Donohue*, 368 S.W.2d 432 (Mo. 1963); *Dewey v. Doxey-Layton Realty Co.*, 3 Utah 2d 1, 277 P.2d 805 (1954). Generally, the rationale of these decisions is that the initiative procedure does not provide for a hearing, which is required under most of the state zoning statutes. The validity of the rationale is at least questionable. A New Jersey court has observed, "The election campaign, the debate and airing of opposing opinions, supplant a public hearing prior to the adoption of an ordinance by the municipal governing body." *Meridian Development Company v. Edison Township*, 91 N.J. Super. 310, 315, 220 A.2d 121, 124 (1966) (citations omitted).

In any case, the present controversy is concerned with the use of a referendum. Consequently, there is always a hearing by the Planning Commission and a second hearing by the City Council before any zoning measure is presented to the voters for their approval. Thus there can be no question that a zoning referendum authorized by state law is permissible.



lates the due process clause of the United States Constitution.

Respondent's principal argument hinges on a series of three cases which involved local restrictions on zoning ordinances. In *Eubank v. City of Richmond*, 226 U.S. 137 (1912), a municipal ordinance provided that building lines would be established upon request by two-thirds of the owners of property abutting any street. The Court ruled that the ordinance was invalid because:

> *One set of owners* determine not only the extent of use but the kind of use which another set of owners may make of their property. *Id.* at 143 (emphasis added).

Because only the neighbors on the same street were involved in the decisionmaking process, the Court observed that it would be possible that "*One* person having a two-thirds ownership of a block may have that power against a *number* having a less collective ownership." *Id.* at 144 (emphasis original).

Next, in *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917), a Chicago ordinance prohibited the erection of billboards in certain areas except with the consent of the neighbors "owning the majority of the frontage on both sides of the street in any block" in which the billboard was to be erected. *Id.* at 52. In upholding the ordinance, the Court distinguished *Eubank* in that it had been concerned with imposing an additional restraint, while the Chicago ordinance allowed the property owner to be relieved of restrictions if the neighbors consented.

Finally, in *Washington, ex rel. Seattle Title Trust Co., v. Roberge*, 278 U.S. 116 (1928), a Seattle ordinance provided that philanthropic homes for children or old people

were permitted in a First Residence District, but only with the consent of the owners of two-thirds of the property within four hundred feet of the proposed building. The Court ruled that the ordinance constituted an invalid delegation of legislative power, and therefore violated the due process clause.

These three cases, however, are readily distinguishable from the present one. In the earlier cases the imposition of the challenged restriction was decided upon by consent of the neighboring property owners. By definition such owners had personal vested interests in the questions which were delegated to them. In that context, the possibility that the property owners would consider only their individual interests, rather than the best interests of the community as a whole, was of such proportion as to present an understandable threat to the principles of due process. It was as if only one councilman were permitted to determine the issues which affected the ward which he represented. That kind of arrangement stands in stark contrast to the referendum procedure of the present case.

Under the challenged Eastlake Charter provision the voters of the entire community have the right to voice their opinions on matters that involve zoning. The distinction between a decision by a handful of neighbors and that of the electorate has been clearly defined by the Ninth Circuit Court of Appeals in *Southern Alameda Spanish Speaking Organization v. City of Union City, Cal.*, 424 F.2d 291 (9th Cir. 1970):

> A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views



> of their elected representatives as to what serves the public interest. See Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968). This question lay at the heart of the proposition put to the voters. That some voters individually may have failed to meet their responsibilities as legislators to vote wisely and unselfishly cannot alter the result. *Id.* at 294.

Similarly, in *James v. Valtierra, supra,* this Court upheld a mandatory referendum provision in California. Writing for the majority, Justice Black concluded that a mandatory referendum gives the citizens of a community "a voice in decisions that will affect the future development of their own community." 402 U.S. at 143.

While the *Valtierra* case involved a referendum for low-rent housing projects, the reasoning of the Court is even more cogent when applied to zoning matters. Zoning issues are undoubtedly among the most important questions faced by a municipal government. As Mr. Justice Marshall recently stated:

> . . . zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. *Village of Belle Terre v. Boraas,* 416 U.S. 1, 13 (1974) (dissenting opinion).

Considering zoning's vast importance to the citizens of a community, it would be paradoxical to deny the voters a voice in zoning decisions under the guise of the due process clause.

Furthermore, if respondent's argument is correct that *Eubank, Cusack,* and *Roberge* apply to the facts of the

present case, it is difficult to determine where the line should be drawn. If the reasoning of those cases is extended so that it applies to city-wide elections, then no initiative and no referendum would ever be valid. Obviously, such an argument sweeps far too broadly.

Respondents have argued, and the Ohio Supreme Court has ruled, that the Eastlake mandatory referendum constitutes "an unlawful delegation of legislative power." 41 Ohio St. 2d at 198, 324 N.E.2d at 747. The ruling is based, not on an interpretation of the Ohio Constitution, but on the due process clause of the federal constitution. Such reliance on the due process clause is misplaced and demonstrates a misconception of the nature and source of legislative power.

As noted above, Section 1f of Article II of the Ohio Constitution expressly "reserves" the power of referendum to the people. The power is inherent in the people; it is therefore difficult to understand how it can be said that it has been unlawfully delegated to them. It is even more difficult to understand how such an argument can be based on the federal constitution when the tenth amendment expressly provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*. U.S. CONST. Amend. X (emphasis added).

As our Declaration of Independence so eloquently states, the power of the government is derived "from the consent of the governed." While both state and federal constitutions delegate much of the legislative power to the respective legislatures, the power of referendum has been specifically reserved to the people in Ohio under their state constitution. *See State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 114 N.E. 55 (1916), *aff'd*, 241 U.S. 565. This reservation of power provided for in the state constitution is expressly protected by the tenth amendment of the federal constitution. The determination of legislative questions by referendum, therefore, is the exercise not of a delegated power, but of a reserved power. It is the people themselves giving their consent to be ruled by an ordinance of their own making.



The distinction between reservation and delegation highlights the distinction between *Eubank, Cusack* and *Roberge* and the present case. In the former, legislative authority was delegated to a small group of neighbors. In the instant case, the *electorate* is exercising its reserved power.

Respondent has also expressed concern that to permit voters to decide zoning issues would permit them to make decisions which would be arbitrary and capricious, and that there would be no necessary and substantial relationship between zoning regulations and the public health, safety, morals, or general welfare as is required by constitutional standards. It is submitted, however, that there is likewise no guarantee that legislation enacted by a municipal legislative authority will meet constitutional standards. The remedy in both cases, of course, is not to invalidate the procedure, but to use the judicial remedies which are always available. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). A prejudgment, however, that the electorate cannot be entrusted with such matters undermines the very foundation of our democracy, which is founded on the principle of government by the people.

The expressions of distrust for the judgment of the electorate which permeate respondent's argument are unbefitting our democratic heritage. For this Court to embrace such distrust would certainly not do justice to that heritage.

## II. THE CITY OF EASTLAKE'S MANDATORY REFERENDUM PROCEDURE FOR ZONING ORDINANCES IS DESIGNED TO PROTECT THE PROPERTY INTERESTS OF ALL THE CITY'S CITIZENS, AND INFRINGES ON NO CONFLICTING CONSTITUTIONAL RIGHTS.

As this Court stated nearly fifty years ago, zoning is a product of the modern age. *Village of Euclid v. Amber Realty Company, supra,* at 386. It imposes a variety of restrictions on the use of property so that the rights remaining may be more fully enjoyed. Because our society is growing constantly more complex, the role of zoning in preserving orderly development is increasingly more vital. This the Court has consistently recognized. *Berman v. Parker,* 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas, supra.* Little more than a year ago, Mr. Justice Douglas outlined the breadth of the zoning power as follows:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and blessings of quiet seclusion and clean air make the area a sanctuary for people. *Village of Belle Terre* at 9.

Although it has been argued by some that modern planned development as reflected in zoning laws is exclusionary, and that it inhibits the exercise of other fundamental constitutional rights such as the right to travel and freedom of association, these arguments have been repeatedly rejected. *Village of Belle Terre* at 7; *Construction Industry Association of Sonoma County v. City of Petaluma,* 44 L.W. 2093 (9th Cir. 1975); *Golden v. Planning Board of Ramapo,* 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972), *appeal dismissed,* 409 U.S. 1003.



In assessing the burdens that zoning imposes on some property owners, it is important not to lose sight of the various interests that are protected by a zoning plan. Once a plan is established, property owners place a certain degree of reliance on the fact that the zoning will not be changed hastily. A party who complains that he is not permitted to build multi-family apartment complexes on his property because it is zoned for single family residential use would be the first to complain if heavy industry were permitted to move in next to one of his apartment buildings. On balance, it is clear that zoning does far more to protect property rights than to restrict them.

The Court in *Ambler* was fully aware of the importance of zoning in protecting property rights, stating its concern as follows:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased

traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities, until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances. 272 U.S. 394-95.

Further, the interests of the voters in supervising the zoning of their city is not limited to the protection of their property. Zoning changes can have a tremendous impact on city services and the resultant taxes that voters will be required to pay to maintain those services. The sudden influx of multi-story apartment buildings can seriously threaten the financial stability of a small community if not properly planned and prepared for. The *Valtierra* Court appreciated the fact that a mandatory referendum was an effective method for allowing voters to exercise their franchise on matters that have such an impact on their city:

> This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. 402 U.S. at 143.

As the areas surrounding our large urban centers continue to experience rapid growth, it becomes increasingly important to direct that growth through well considered zoning measures. It is not only reasonable, but good government as well, to allow the citizens of a community, who



are the ones most affected by such growth, to play an active role in shaping its direction. The interests of the community's citizens in having a voice in matters so fundamental to their welfare far outweigh the interests of those who would challenge such a procedure. Furthermore, in the event that the electorate fails to meet its obligation to legislate responsibly, the courts remain open to guarantee that constitutional standards are met.

## III. THE CITY OF EASTLAKE'S MANDATORY REFERENDUM PROCEDURE CONSTITUTES NO DENIAL OF EQUAL PROTECTION.

The amicus brief of Lawyers for Housing filed with the Ohio Supreme Court and the concurring opinion of Mr. Justice Stern have raised the specter of racial discrimination. Justice Stern stated:

> Zoning provisions such as that in Eastlake's charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas. 41 Ohio St. 2d at 200, 324 N.E.2d at 749.

Although respondents have not squarely presented an equal protection argument, an alchemic mix of due process and equal protection has been carefully blended into their arguments with the use of words such as "suspect" and "exclusionary". In accepting these arguments, Justice Stern wrote, "The inevitable effect of such provisions is to perpetuate the de facto divisions in our society between black and white, rich and poor." *Id.* at 201, 324 N.E.2d at 749. The language hearkens back to the "invidious discrimination" of *Reitman v. Mulkey*, 387 U.S. 369 (1967), and notions of "substantive equal protection." However, a careful analysis of *Reitman* and its progeny demonstrates

that the Eastlake Charter provision is based on neutral principles and that it suffers from no constitutional infirmity.

*Reitman*, it will be recalled, involved a constitutional amendment in California which repealed the state's fair housing legislation and gave property owners the right to sell their property to whomever they chose, even if they chose to discriminate against blacks or other racial minorities. The discriminatory intent of the amendment was not only self-evident, it was constitutionalized. It conferred a constitutional right to discriminate on every owner of real property.

In *Hunter v. Erikson*, 393 U.S. 385 (1969), discriminatory distinctions were actually written into the Akron charter amendment. The amendment provided that any ordinance which regulates the use, sale, advertisement, transfer, listing, assignment, lease, sublease, or financing of real property on the basis of race, color, religion, national origin, or ancestry must first be approved by a majority of the electors before becoming effective. In striking down the charter amendment the Court observed:

> Only laws to end housing discrimination based on "race, color, religion, national origin or ancestry" must run § 137's gantlet. It is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But § 137 nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on



> sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes. *Id.* at 390-391.

Because the amendment made distinctions which were constitutionally suspect, the Court applied a test of strict scrutiny requiring a "far heavier burden of justification." *Id.* at 392.

The distinction between Eastlake's charter provision and the one invalidated in *Hunter* is as clear as it is fundamental. Eastlake has not attempted to place differing burdens on differing kinds of zoning legislation. Legislation which would establish stricter zoning standards is subjected to the same scrutiny of the voters as is legislation which would relax the zoning. Whether the zoning affects housing, or whether it affects commercial or industrial uses, the procedure for change is identical. The only classification established by the charter provision is the one that singles out zoning and land use measures for mandatory voter approval. The classification touches on no suspect category and requires only a rational basis to be sustained. The desire of the electorate to scrutinize ordinances which can seriously affect the vested property rights of Eastlake's citizens certainly justifies such a classification. The voters of Eastlake approved the city's original zoning plan; it is only reasonable that they be permitted to take part in any determination to change that plan.

*James v. Valtierra*, 402 U.S. 137 (1971), like *Reitman*, arose in California. An article of the state constitution provided that no low-rent housing project could be developed, constructed, or acquired in any manner by any

state public body until such project was approved by a majority vote in a community election. Arguably, the application of the provision only to low-rent housing could have a disproportionate effect on racial minorities. The Court expressly rejected the argument, however:

> Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race. *Id.* at 391. The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. Cf. *Comilion v. Lightfoot*, 364 U.S. 339 (1960). The present case could be affirmed only by extending *Hunter*, and this we decline to do. *Id.* at 141.

The *Valtierra* Court recognized that a mandatory referendum provision did place some additional burden on those affected by it. But the Court explained that such burdens are the necessary concomitant of any governmental process:

> [A]ppellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative. They suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. *Under any such holding, presumably a State would not be*



> *able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.* And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people. 402 U.S. at 141-42 (emphasis added).

The charter provision at issue in this case rests on even firmer ground than did the constitutional provision in *Valtierra*. It applies not only to zoning that would permit low-rent housing, but to all zoning or land use proposals of whatever kind. Furthermore ,as in *Valtierra*, the record is devoid of any evidence that the amendment was in fact aimed at a racial minority. To affirm the Ohio court in this case would be a far greater extension of *Hunter* than that which was advocated by the plaintiffs in *Valtierra*. As in *Valtierra*, this Court should decline to so extend the holding of *Hunter*. For as the *Valtierra* Court concluded:

> This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws." *Id.* at 143.

In the past this Court has stood ready to invalidate zoning which in fact discriminates against racial minorities. *Buchanan v. Warley*, 245 U.S. 60 (1917); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6 (1974). Should the voters of Eastlake decide to enact zoning laws which are discriminatory, the courts will certainly be available to provide relief. But it is both premature and unjust to indict a procedure which is founded on democratic principles and applicable in an even-handed manner to all zoning and land use measures.

## CONCLUSION

Nearly fifty years ago, this Court recognized that a municipality, although it may be a suburb of a large metropolitan city, is nonetheless politically distinct. It was argued at that time that the City of Euclid, which joins in this brief, could not be permitted to determine its own future. The Court forcefully rejected that argument, writing:

> It is said that the village of Euclid is a mere suburb of the city of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village and, in the obvious course of things, will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland *is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the state and Federal Constitutions. Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 389 (emphasis added).

Today, Euclid, now a city and the Cities of Kirtland, Willoughby Hills, and Willowick, join with the City of Eastlake in asking this Court to permit the citizens of these communities to exercise the powers that have been reserved to them under the constitutions of Ohio and of the United States.

At a time when many people have grown to distrust government and feel estranged from it, and when many have felt helpless in their efforts to cope with growing bureaucracies, which affect their lives in so many ways, it



is important to restore the trust and sense of participation which has been the hallmark of this American society since the Revolution. From the town meetings of New England, amendments of state constitutions, citizens have valued their role in America's experiment in democracy. To continue to permit citizens active participation in their government can only lead to a more informed and responsible electorate. The decision of the Ohio Supreme Court must be reversed.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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No. 74-1563

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THE CITY OF EASTLAKE, ET AL.,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.,
Respondent.

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On Writ Of Certiorari To The Supreme Court of Ohio

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## BRIEF OF AMICUS CURIAE STATE OF OHIO

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## BRIEF OF AMICUS CURIAE STATE OF OHIO

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## INTEREST OF STATE OF OHIO

The State of Ohio, by its Attorney General as chief law officer, has an interest in ensuring that all State laws are interpreted pursuant to controlling constitutional and statutory standards and authority. For this reason, the State of Ohio, by its Attorney General, respectfully submits this brief as *amicus curiae* pursuant to Rule 42, Part IV of the Revised Rules of the Supreme Court of the United States.

## OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 41 Ohio St. 2d 187, 324 N.E. 2d 740 (1975). *Forest City Enterprises, Inc.* v. *City of Eastlake.* The Opinions of the Eleventh District Court of Appeals, Lake County, Ohio, and the Court of Common Pleas, Lake County, Ohio, which are not reported, are printed in the Single Appendix at pages 23 and 19 respectively.

## JURISDICTIONAL STATEMENT

The decision of the Supreme Court of Ohio was rendered on March 19, 1975. After a timely Petition for Re-hearing was denied on April 17, 1975, the City of Eastlake filed its Petition for Certiorari on June 12, 1975. That Petition was granted on October 14, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

## CONSTITUTIONAL, CITY CHARTER AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Fourteenth Amendment

Constitution of the State of Ohio
Article II, Section 1f
Article XVIII, Section 3

Charter of the City of Eastlake, Ohio
Article VIII, Section 3

Ohio Revised Code § 713.01 – 713.12



## QUESTION PRESENTED

Whether the City of Eastlake's Charter provision which grants to municipal voters the power to reject or approve a change in the City's comprehensive zoning plan violates due process of law by subjecting a property owner's use of land to restrictions without any substantial relationship to the public health, safety, morals or general welfare of the community.

## STATEMENT OF FACTS

Respondent, Forest City Enterprises, Inc., owned property within the City of Eastlake which, prior to May 18, 1971, was zoned for limited industrial use under Eastlake's zoning ordinances. On May 18, 1971, Respondent filed an application with Eastlake City Planning Commission and Eastlake City Council for a change in zoning of its property to multi-family, high-rise use. City Council, on December 28, 1971, enacted an ordinance approving Respondent's application for the zoning change.

In the interim, Article VIII, Section 3 of the Charter of the City of Eastlake was adopted as an amendment to the City Charter at the general election held on November 2, 1971. That charter provision requires all ordinances passed by City Council dealing with land use or development to be submitted to the municipal voters for approval or rejection. Before an ordinance can be effective, it must receive a 55 percent affirmative vote.

Pursuant to the enactment of Article VIII, Section 3 of the City Charter, the ordinance which granted Respondent's application for a change in zoning of its property was submitted to Eastlake voters at the primary election of May, 1972. The ordinance failed to obtain the necessary 55 percent affirmative vote, and Respondent was not

granted its application for the change in zoning which had been approved by City Council.

## SUMMARY OF ARGUMENT

Article VIII, Section 3 of the City Charter of the City of Eastlake constitutes an unconstitutional delegation of legislative power to Eastlake municipal voters, because it enables them to approve or reject City ordinances which involve land use restrictions. Zoning legislation, or a change in a city's comprehensive land use plan, requires strict adherence to precise, constitutional standards mandated by the due process clause of the Fourteenth Amendment. City Council, or other governmental units, are the proper authority for ensuring that constitutional safeguards are adhered to prior to subjecting a land owner's property rights to use restrictions. To submit municipal ordinances that involve property rights to the municipal voting population for approval or rejection would subject property rights to restrictions totally unrelated to controlling constitutional standards, and may result in land use restrictions based upon mere whim, personal taste or caprice.

Alternately, there are state grounds which support the decision below, and the Ohio Supreme Court should have the opportunity to reconsider the state grounds should this Court determine that Article VIII, Section 3 of the Eastlake City Charter does not violate due process of law. The Ohio Supreme Court recognized that grants of relief from unnecessary hardship under a zoning plan are administrative acts not subject to referendum. Because the Ohio Supreme Court found that the Charter provision violated due process of law, it did not determine whether City Council acted in an administrative or legislative capacity in this instance. Therefore, should this Court determine that the Charter provision is lawful, the Ohio Supreme Court should have the opportunity to rule on whether Eastlake City Council acted in an administrative or legislative capacity.



Also, the Charter provision may violate the Ohio Constitution, Article XVIII, Section 3, which empowers municipal governments to enact regulations not in conflict with the general laws of Ohio. The Ohio Supreme Court recognized that a cumbersome zoning appeal process such as Article VIII, Section 3 of the Charter of Eastlake may involve serious constitutional questions; however, the Court indicated that it did not need to reach this issue, because it found the Charter provision in violation of due process of law. Moreover, Ohio Revised Code § 713.06 empowers municipalities to adopt zoning ordinances provided that the ordinances bear a relationship to the public interest. Unless Article VIII, Section 3 ensures that the public interest will be promoted by submitting land use restrictions to the voting populace, the Charter provision may be unlawful under Ohio statutes.

Therefore, because there are alternative state grounds which support the decision of the Ohio Supreme Court, it should have the opportunity to rule on these grounds even if this Court determines that the Eastlake City Charter provision is constitutional under the Fourteenth Amendment.

## ARGUMENT

### I. ARTICLE VIII, SECTION 3 OF THE EASTLAKE CITY CHARTER, WHICH REQUIRES MANDATORY VOTER APPROVAL OF ANY PROPOSED LAND USE CHANGE, DENIES DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Ohio Supreme Court held below that the Eastlake City Charter provision requiring submission of a zoning change, which had already been approved by City Council, to the city voters for approval constitutes an unlawful delegation of legislative power, repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. The Court below correctly interpreted this Court's decisions in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), and *Eubank* v. *Richmond*, 226 U.S. 137 (1912), and distinguished this Court's decision in *Thomas Cusack Co.* v. *Chicago*, 242 U.S. 526 (1917), in determining that due process of law requires any changes in municipal zoning ordinances, which alter a property owner's use of land, to be founded on precise, constitutional standards and safeguards rather than upon the whim or caprice of the municipal population.

The constitutional flaw of the ordinance at issue herein is that it allows a minority of voters to determine, or even dispose of, the property rights of others, but creates no standards by which that power is to be exercised. This destroys any vestige of rights of ownership of private property, because there need be no relationship to the public health, safety, welfare, or morals in the zoning decision — mere caprice or arbitrary taste may control. *Eubank, supra*



at 143-144. The due process clause of the Fourteenth Amendment does not permit subjecting an individual's constitutional rights to property to the vagaries of the ballot box.

It is well settled that a municipal zoning ordinance which restricts or interferes with a property owner's use or enjoyment of his land will be upheld as a constitutionally valid exercise of the police power if it bears a substantial relationship to the public health, safety, morals, or general welfare of the community. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). This is the only basis upon which zoning restrictions on the use and enjoyment of property may rest. Yet, under Eastlake's Charter provision there need be no substantial relationship to any public purpose.

In accord with the requirements for zoning ordinances outlined in *Euclid* v. *Ambler Realty Co., supra,* and pursuant to authority granted by Article XVIII, Section 3 of the Ohio Constitution, the General Assembly of Ohio has passed legislation which enables its municipalities to enact comprehensive zoning ordinances, provided however, that such ordinances must be enacted in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare. Sections 713.01 — 713.12, Ohio Revised Code. By mandating that municipal zoning ordinances be in the public interest, the State of Ohio has recognized that the rights of a property owner to use and enjoy land must be unfettered by selfish, unreasonable or arbitrary interests. Only when the individual use of land must be limited to protect a substantive public interest does federal or state law permit interference with an individual's property rights.

After a careful analysis of this Court's decisions in *Eubank, supra*; *Roberge, supra*; and *Cusack, supra,* the Ohio Supreme Court held:

> Due process of law requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government. [citation omitted] The Eastlake charter provision ignored these concepts and blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational. For these reasons, the provision clearly violates the due process clause of the Fourteenth Amendment. 41 Ohio St. 2d 187, 196 (1975).

The facts in this case are similar to those set forth in *State of Washington ex rel. Seattle Title Trust Co.* v. *Roberge, supra.* In that case, City Council for Seattle determined by its enactment of a zoning ordinance that a philanthropic home for children or the elderly would be appropriate for a residentially zoned district, provided however, that written consent of two-thirds of the owners of property within 400 feet of the proposed building first be obtained. This Court rejected the consent requirement of proximate property owners found in the ordinance, as repugnant to the due process clause, because there were:

> "no provision[s] for review under the ordinance; their [the proximate property owners'] failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject [the applicant] to their will or caprice." *Id.* at 122.

Upon the action taken by the City Council of Seattle alone to permit the building of the philanthropic home,



this Court recognized that Council's decision was founded in the public interest. *Id.* at 121. Similarly, the City Council of Eastlake, by granting Forest City Enterprises' application for a zoning change, acted pursuant to their official duty and aware of their public responsibility. Yet, despite the responsible action taken by Eastlake City Council, the approved application was submitted to a vote and rejected.

In *Roberge, supra,* the city ordinance at least attempted to relegate approval of the land use change to those persons most affected by changes within the neighborhood, *i.e.,* those property owners within 400 feet of the proposed philanthropic home. Yet, this Court rejected the approval requirement as an attempted delegation of legislative power in violation of due process standards. Here, the City of Eastlake, under the auspices of a referendum protected by the Ohio Constitution, attempts to relegate approval of land use changes made by City Council, no matter how small, to the consent of the entire municipal voting population, most of whom will have no substantial interest in the change. The constitutional infirmity of the delegation of legislative power exists whether that power is delegated to property owners within 400 feet of a proposed zoning change site, or to the entire voting population of a municipality.

## II. EVEN IF THE REFERENDUM REQUIREMENT SET OUT IN ARTICLE VIII, SECTION 3 OF THE EASTLAKE CITY CHARTER IS NOT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SUCH REFERENDUM REQUIREMENT MAY BE UNCONSTITUTIONAL UNDER EITHER ARTICLE II, SECTION 1f OR ARTICLE XVIII, SECTION 3 OF THE OHIO CONSTITUTION, OR UNLAWFUL UNDER SECTION 713.06, OHIO REVISED CODE.

There are alternative state grounds which support the decision of the Supreme Court of Ohio. If this Court determines that the referendum requirement of Article VIII, Section 3 of the Eastlake Charter is not unconstitutional under the Fourteenth Amendment to the United States Constitution, the case should be remanded to the Ohio Supreme Court for a reconsideration of the state grounds which support the conclusion of the Ohio Supreme Court that such section of the Eastlake City Charter is invalid.

The Ohio Supreme Court did not address these state grounds in full because it found the charter referendum decision to be an unconstitutional delegation of legislative authority under the Fourteenth Amendment to the United States Constitution. Given the fact that "[z]oning . . . may indeed be the most essential function performed by local government . . ." *Belle Terre* v. *Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting), it is essential that the Ohio Supreme Court be permitted to fully address the state issues raised in this case, even if this Court disagrees



with the Ohio Supreme Court's interpretation of the Fourteenth Amendment's due process provisions.

The Ohio Supreme Court decision was based not only on the Fourteenth Amendment due process clause, but also on Article II, Section 1f of the Ohio Constitution. The first paragraph of the syllabus[1] of the Court states:

> 1. Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are "authorized by law to control by legislative action." (Paragraph one of the syllabus in *Myers* v. *Schiering*, 27 Ohio St. 2d 11, approved and followed.) 41 Ohio St. 2d 187

The opinion notes that even though the power to zone through passage of a comprehensive zoning ordinance is a legislative function subject to referendum, "[g]rants of relief from unnecessary hardship . . . are classified as administrative acts, regardless of the label placed on them," *Id.* at 190, and are not subject to referendum. Thus, if the procedure set out in Article VIII, Section 3 of the Eastlake City Charter to obtain a land use change is administrative, then it is not subject to referendum under Article II, Section 1f of the Ohio Constitution, and Article VIII, Section 3 of the Eastlake City Charter must fall. The Court stated that "[i]nsofar as this [charter provision] purports to mandate a referendum as to an administrative determination, it is clearly invalid." *Id.* at 191.

Rather than make a determination on whether the charter provision, as it related to the land use change sought by Forest City Enterprises, Inc., Respondent herein, was administrative or legislative, however, the Ohio Supreme

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[1] The syllabus in cases considered by the Ohio Supreme Court is prepared by the Court and is the statement of the law upon which the decision was reached. *See Beck* v. *Ohio*, 379 U.S. 89, 93 n.2 (1964); *Cassidy* v. *Glossip*, 12 Ohio St.2d 17, 23 N.E.2d 64 (1967).

Court chose to determine the constitutionality of the provision under the Fourteenth Amendment's due process clause by construing the referendum requirement as applying only to land-use changes made by City Council in a legislative capacity. Because the Ohio Supreme Court found that the referendum requirement denies due process of law under the Fourteenth Amendment, it was not necessary for the Court to go back and determine the administrative or legislative character of the land-use change decision.

The referendum requirement may also be unconstitutional under Article XVIII, Section 3 of the Ohio Constitution. That section states:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.

The procedures prerequisite to a land-use change are set forth in Article VIII, Section 3 of the Eastlake Charter, and govern "any change" in existing land use, or "any change whatsoever to any ordinance," or "the enactment of any ordinance," affecting the use of land. To effectuate such a proposed change of land use, no matter how small, the proposed change must first be approved by the City Planning Commission. Next, the change must be approved by the City Council. If Council approves, the change must be ratified by 55 percent of the voters of Eastlake at the next regular municipal election, or at a special election falling on the generally established election day, with the cost of the required election borne by the applicant.

The Ohio Supreme Court recognized that a cumbersome and costly zoning appeal process, "designed solely to delay



and discourage land-use changes", and bearing "no rational relationship to a valid police power objective . . . would present grave constitutional questions." 41 Ohio St. 2d at 196, n.4, citing *Burt Realty Corp.* v. *Columbus*, 21 Ohio St. 2d 265 (1970). The Court states, however, that because it determined that the referendum requirement denies due process of law, it is unnecessary to reach those other constitutional issues. The concurring opinion of Justice Stern, joined by a majority of the Ohio Supreme Court, states:

> There can be little doubt of the true purpose of Eastlake's Charter provision — it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive . . . The restrictive purpose of the provision is crudely apparent on its face. . . . [I]t is to render change difficult and expensive under the guise of popular democracy. *Id.* at 199-200.

If this Court reverses the due process holding of the Ohio Supreme Court, the Ohio Court then must have an opportunity to address those "grave constitutional questions."

In addition to being unconstitutional under the two Ohio Constitutional provisions discussed above, the Eastlake City Charter referendum provision may also be unlawful under Section 713.06, Ohio Revised Code. This statute delegates charter power to municipalities and provides in part:

> Any municipality may frame and amend a charter for its government . . . name and adopt a plan for dividing the municipal corporation or any portion thereof into zones or districts . . . in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare.

Thus, while Eastlake has power over zoning, its zoning

enactments must promote some public purpose. Justice Stern's concurring opinion states:

> . . . a law which requires a property owner, who proposes a wholly benign use of his property, to obtain the assent of thousands of persons with no such interest, goes beyond any reasonable public purpose. 41 Ohio St. 2d at 200.

Because the Eastlake City Charter provision furthers no proper public purpose, it is unlawful under Section 713.06, Ohio Revised Code.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Ohio Supreme Court that the Eastlake City Charter referendum requirement denies due process of law under the Fourteenth Amendment to the United States Constitution. In the alternative, if this Court determines that there is no due process violation, this matter should be remanded to the Ohio Supreme Court for full consideration of the sufficient Ohio constitutional and statutory grounds supporting the judgment of that Court.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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THE CITY OF EASTLAKE, et al.,
*Petitioners,*

vs.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

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On Writ of Certiorari to the Supreme Court of Ohio

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## BRIEF OF AMICI CURIAE, NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN SOCIETY OF PLANNING OFFICIALS, AND AMERICAN INSTITUTE OF PLANNERS

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

## No. 74-1563

**THE CITY OF EASTLAKE, et al.,**
***Petitioners,***

**vs.**

**FOREST CITY ENTERPRISES, INC.,**
***Respondent.***

On Writ of Certiorari to the Supreme Court of Ohio

## BRIEF OF AMICI CURIAE, NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN SOCIETY OF PLANNING OFFICIALS, AND AMERICAN INSTITUTE OF PLANNERS

### INTEREST OF AMICI CURIAE

This Amici Curiae brief is respectfully submitted by the National Association of Home Builders, American Society of Planning Officials, and American Institute of Planners, in support of respondent, Forest City Enterprises, Inc. with the consent of all the parties to this case, pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States.

The National Association of Home Builders (NAHB) is a professional trade association representing the home building industry. With its more than 600 affiliated state and local associations and over 76,000 members, NAHB is the voice of America's housing industry.

Builder members vary in their operations. They construct single-family homes, townhouses, condominiums and apartments; shelter for people in all walks of life. They also build the schools, churches, shopping centers, and other commercial structures which are so vital to our communities.

Associated with the builders in NAHB are architects, engineers, financial institutions, public utilities, manufacturers, retail and wholesale firms, subcontractors, and other professionals and businesses related to the home building industry.

As a representative of the housing industry NAHB believes that it is obliged to express its views on the significance of the case now before this Court. Construction, whether it be of houses, schools, churches, or commercial structures, often can only occur after a builder is granted appropriate zoning. Since 1926 when this Court first considered the legal validity of zoning and established the process and standards by which land use decisions are to be implemented, builders have been provided a degree of certainty as to where they can and cannot build by the standards and provisions contained in zoning ordinances. The Eastlake charter amendment strikes at the heart of this certainty. At a time in our history when the housing industry is experiencing its most severe economic decline since World War II, Eastlake has imposed an additional and constitutionally suspect obstruction in the path of orderly community development, thereby further impeding the ability of this industry to assist the country in meeting its housing needs.



The American Society of Planning Officials (ASPO) is a national, nonprofit membership association devoted to the development and effective application of the best techniques for managing the development of cities, regions, states and the nation. ASPO brings together the professional planner and citizen member of local boards and commissions from urban, suburban and rural areas; the elected official and community groups; the developer and development regulator; the practitioner, student and academician. Founded in 1934, ASPO presently has more than 13,000 members.

ASPO pursues the objectives of the former National Conference of City Planning, one of the amici in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and was served by Alfred Bettman, author of the National Conference's amici brief in *Euclid,* as its founding president. ASPO administers a fund, in memory of Bettman with which it regularly holds symposia on issues of planning law.

As a service organization, ASPO facilitates communication among all groups in planning. It serves as the national clearing house for planning information and identifies and analyzes important trends in the planning field. Through contract research and membership service programs, ASPO provides the professional planner, government agency, and other interested persons with current information on planning and advice on emerging developments in the field.

American Institute of Planners (AIP) is the national organization of professional urban and regional planners in America. Its members work for city, county, regional, state and national governments, as well as with private consulting firms. Approximately 10 per cent of its members work for university and research organizations. The principal current concerns of the organization are with the critical issue of urban growth and change and their

coordination with environmental and social policies. The purpose of AIP is to encourage orderly growth and development responsive to the needs and problems of society. AIP was founded in 1917 and it presently has a membership of 12,000 in 39 chapters across the United States.

AIP believes an ongoing planning process is essential to a fair administration of land use policies and regulations. It has been a consistent principle of AIP since its inception over half a century ago that land use planning and land use controls are inextricably intertwined, and are necessarily so if rational provision is to be made for the use of land on a basis which benefits the community as a whole and is consistent with the reasonable interests of individual property owners.

## SUMMARY OF THE ARGUMENT

> "Decisions which amend or change conditions under existing zoning laws therefore require an extremely sensitive balance between individual rights and the public welfare." *Fleming* v. *City of Tacoma,* 81 Wash. 2d 292, at 295; 502 P.2d 327, at 329 (1972).
>
> ". . . the comprehensive plan is the essence of zoning. Without it there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll." *Udell* v. *Haas,* 21 N.Y.2d 463, at 469; 288 N.Y.S.2d 888, at 893-94 (1968).

Almost half a century and more than 10,000 reported zoning cases after the decision of this Court in *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926), the Village of Eastlake, Ohio has devised a scheme to upset the delicate balance between rights in private property and



the police power, that "least limitable of governmental powers." *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80, at 83 (1946.)[1]

The opinion in *Euclid* represented a major departure from traditional legal doctrine concerning the legitimate grasp of public regulation on the use of private property. That decision was reached only after considerable travail by this Court and not until it was persuaded, on rehearing, that the restrictions imposed by zoning were a result of careful deliberation and planning.

Judicial scrutiny of municipal zoning practice by the state courts during the fifty years since *Euclid* is a history of increasing insistence by those courts that the zoning power be processed fairly and be based not upon popular or official whim but upon forethought and study.

The state courts have come to regard these procedural and substantive safeguards as essential to meet the due process imperatives of the Fifth and Fourteenth Amendments to the United States Constitution in a system of municipal law where opportunities to seek change in response to individual petitions are so dominant a feature. These state courts, after more than five decades of disposing of zoning litigation—substantially all of it involving dis-

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[1] Norman Williams, Jr., in his recent 5-volume work, *American Land Planning Law* (1975), states that up to 1969 there had been more than 10,000 reported zoning decisions, p. vii. With few exceptions, most of these have been in the state courts. In the forty-six years between the decision in *Nectow* v. *City of Cambridge,* 277 U.S. 183 (1928), and the decision in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974), this Court decided only one zoning case, *Seattle Title and Trust Co., Trustee* v. *Roberge,* 278 U.S. 116 (1928). In *Roberge* a consent provision in a zoning ordinance which delegated legislative power to neighbors was "repugnant to the due process clause of the Fourteenth Amendment." *Id.* at 122.

putes over requests for changes—have recognized the essential distinction between the initial enactment of a *comprehensive* zoning ordinance applicable to all, and an individual request for a change.

A decision to adopt or reject a comprehensive zoning ordinance represents a community-wide policy. A petition for a change for a particular tract is at bottom a dispute among competing interests: the landowner-petitioner, the landowner-neighbors, and the community at large. It is in this contest of private interests over the rezoning of particular parcels that the state courts have shown most concern that a fair process be maintained and that the substantive decisions be based on forethought, whether it is the petitioners or the neighboring objectors who believe they were injured by a local decision. In either instance, a decision to deviate or not to deviate from the general rule established by the comprehensive zoning plan can impinge on property rights. The state courts have insisted that decisions to grant or deny petitions to rezone, pitting as they do conflicting property interests against each other, must be based on the most punctilious balancing of the public welfare and individual rights.

A mandatory referendum upon every proposed zoning change is antithetical to such a thoughtful evaluation of all the facts. Such a referendum subjects what is essentially an adjudicative process by the municipal decisionmakers to ratification or rejection by a show of hands. A mandatory referendum on a zoning change is hardly distinguishable from a popular vote upon a judicial or administrative decision where private interests are being weighed against the use of the police power.[2]

[2] The appropriate balance between private rights in property and the police power is one of the important distinctions between this case and *James* v. *Valtierra*, 402 U.S. 137 (1971). In *James* no issue of a restraint upon private property was involved. It was not a police power case.



## ARGUMENT

### THE DECISION IN EUCLID WAS A SIGNIFICANT EXTENSION OF THE POLICE POWER AND IT WAS BASED UPON A VIEW OF ZONING AS A DELIBERATIVE AND CAREFULLY STUDIED PROCESS.

The decision of this Court in the *Euclid* case was not reached easily. It came only after the Court, of its own motion, set the case for reargument and had the benefit of an illuminating *amicus* brief by Alfred Bettman,[3] a member of the Cincinnati Bar distinguished for his contributions to the rationale behind zoning in its early days.[4]

The opinion in *Euclid* represented a major shift from the traditional judicial position on the scope of the police power. The then accepted view was that the police power could cut back on private rights only when public health or safety were directly involved (fire and pestilence). The *Euclid* decision was a judicial acknowledgment that the police power could be used to preserve and protect urban amenities. In spite of Justice Sutherland's use of the nuisance law as an analogue, he acknowledged that under zoning regulations which authorized the exclusion of nonnuisance uses from residential districts "[t]he bad fades into the good by such insensible degrees that the two are

[3] Brief for Amici, The National Conference on City Planning, The Ohio State Conference on City Planning, the National Housing Association, and the Massachusetts Federation of Town Planning Boards. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *see also* McCormack, *A Law Clerk's Recollections*, 46 Columbia L. Rev. 710 (1946); Metzenbaum, *The Law of Zoning* (1955).

[4] Bettman, *City and Regional Planning Papers* (Harv. Univ. Press, 1946).

not capable of being readily distinguished and separated in terms of legislation." 272 U.S. 365, at 389.

It was undoubtedly this awareness that zoning involved far more subtle values than were at stake in common law nuisances and special fire ordinances, and that there was, therefore, a greater potential for discrimination or unfair invasion of private rights, that led the Court in *Euclid* to observe:

> "The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports." (272 U.S. 365, at 394)

Justice Sutherland quoted extensively from the opinion of the Illinois Supreme Court a year earlier in *City of Aurora* v. *Burns,* 319 Ill. 84, 149 N.E. 784 (1925) which had upheld the principle of zoning. In that opinion the Illinois court observed:

> "The ordinance is the result of more than seven months of study and planning, with the aid of expert advice." *Id.* at 98, and 789.

Mr. Bettman in his brief for *amici* in *Euclid* repeatedly stressed the studies and forethought that underpinned a zoning ordinance:

> "[T]he technique of zoning has advanced to the comprehensive type, which includes height, use, and area regulation as parts of a single plan, *based on careful surveys,* made more reasonable by careful adjustment to the economic, as well as social, factors involved. In the comprehensive ordinance, the locating of the districts and the height, use and area standards are adjusted to *a carefully wrought plan* for the promotion of the health, safety, convenience, and welfare of the whole community." Brief for Amici, p. 8. (Emphasis added)



Later in his brief, Mr. Bettman added:

> "[Zoning] represents the application of foresight and intelligence to the development of the community. If the plan be well made as a result of a careful survey, it is fair and just, for in exchange of the restrictions which it places on each piece of property, it places restrictions for each piece of property *(sic)*, that is for the benefit of each piece of property, and protects each piece of property as well as gives to each piece of property its share of the general health, order, convenience and security which the whole plan brings to the community." *Id.* at 37.

The importance of the deliberative process behind zoning was central to the Bettman brief. This Court, in response, acknowledged the necessity of such a foundation in a system of municipal law where "the bad fades into the good by such insensible degrees."

It was the planning and deliberation that presumably preceded a zoning ordinance which held out the assurance that a "reciprocity of benefits" would protect individual property owners from invidious discrimination.[5]

Three years after *Euclid,* Professor Ernst Freund, auther of *The Police Power,* expressed concern over the potential for unfair treatment when a zoning law, necessarily general in its terms, was applied to specific parcels or geographic areas:

> "Clearly one of the outstanding difficulties of the law of zoning is the irreducibility to type of the situations with which it deals. . . . The irreducibility of areas to types entails the irreducibility of equities to

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[5] "It would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." Holmes, J., *Noble State Bank* v. *Haskell,* 219 U.S. 104, at 111 (1911).

> abstract formulas, and the consequent loss of one of the main safeguards of equal justice, necessitating the search for some substitute. . . . *Hence, the device of the comprehensive plan as one of the main features of zoning legislation.*" (Emphasis added) Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning,* 24 Ill. L. Rev. 135, *op. cit.* note 6, at 141-42 (1929).

Indeed, in 1922, model zoning legislation, the Standard State Zoning Enabling Act, had been published by the United States Department of Commerce[6] and had been enacted by 45 states within a year after this Court decided *Euclid.*[7] That model mandated that zoning regulations must be "in accordance with a comprehensive plan," and most states included the phrase in their enabling acts.[8]

The precise meaning of "a comprehensive plan" has been occasion for debate through the years;[9] but at a minimum the phrase must mean that zoning is to be based on some process of deliberation and analysis.

> "The draft statute [The Standard Act of 1922] stresses the importance of a comprehensive plan as a basis for zoning. This is vital to prevent zoning becoming a mere means of protecting the interests of individuals in a small area without regard to the general interests of the city." Chamberlain, *Zoning Progress,* 15 ABAJ 535, at 537 (1929).

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[6] Standard State Zoning Enabling Act (SSZEA), United States Department of Commerce (1922).

[7] *Survey of Zoning Laws and Ordinances* 2, United States Department of Commerce (1928).

[8] SSZEA, Section 3.

[9] Haar, *In Accordance With a Comprehensive Plan,* 68 Harv. L. Rev. 1154 (1955); Sullivan and Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement,* 9 Urban Law Annual 33 (1975).



The decision in *Euclid* and Bettman's brief were focused on the legitimacy of the *initial* adoption of a comprehensive zoning law. A deliberative process considers existing land use plans, the recommendations of planners, the comments and consensus of the public at large, studies by engineers and environmentalists, and the rights of the property owner. Land use decisions made by elected officials must be based upon this deliberative process. If a concern for rationality and deliberation, in short, for the quality of analysis that goes into such a restriction on private rights is a necessary predicate to the initial enactment, as this Court and Bettman clearly regarded it, *amici* respectfully suggest that an equal or greater concern for evidence of fairness and an absence of capriciousness must, *a fortiori,* be present when individual petitions for change in the district classifications provided for in the comprehensive zoning law are at stake. It is in these subsequent particularized actions that the opportunity for special favors or the denial of equitable treatment requires the most forceful insistence upon fair play—and in zoning the name of the game is change.

## THE PROBABILITY OF INDIVIDUAL REQUESTS FOR CHANGE IS A UNIQUE FEATURE OF ZONING. THIS MAKES THE QUALITY OF DELIBERATION AND THE FAIRNESS OF THE PROCESS WHEN CHANGE IS CONSIDERED, ESSENTIAL TO ENSURE DUE PROCESS.

The hallmark of zoning is the opportunity for individuals to petition for relief—to seek a change—from the general comprehensive zoning plan. This has to be when the inevitability of change in the use of land is considered. Cornfields will be proposed for residential subdivisions; old brownstones are sought to be demolished to make room

A SHOPPING CENTER

for high-rises; and, may soon be proposed on land zoned for industrial use.

From the early decades of this century down to today, American zoning ordinances have recognized the dynamics of land use. In response, zoning ordinances authorize, if not invite, in a manner and to an extent foreign to other municipal regulations, individual petitions for relief.

All zoning ordinances provide for amendments, most zoning ordinances permit variances, and many zoning ordinances authorize another breed of change from the general legislative rules known as "special exceptions," "conditional uses" or "special permit uses." In more recent years additional, more sophisticated and more complex opportunities for private parties to petition for change have been added to these more traditional sources of relief.[10] Whatever they are called, however rudimentary or sophisticated they may be, and by whatever public body they are considered, this panoply of devices fulfills the expectation of all concerned that the comprehensive legislative plan of the zoning ordinance must provide opportunities for change.

> "Zoning maps are constantly being changed, for various reasons; and the question is, under what circumstances are such changes justified. . . . The problem is then to develop criteria for distinguishing valid from invalid zoning changes; . . ." Williams, *op. cit.* note 1, Vol. 1, at 6.

[10] These may, for example, take the form of "floating zones" which appear in the text of the zoning ordinance but are not placed on the zoning map until a specific request of a petitioner that his land be so classified is granted. *Rogers* v. *Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951). "Planned Unit Developments" are, in effect, a procedure to permit a petitioner to propose a development, usually of large acreage, that avoids the rigid regulations for separate lots and yards normally associated with standard zoning regulations. Krasnowiecki, *Planned Unit Development: A Challenge To Established Theory and Practice of Land Use Control*, 114 U. Pa. L. Rev. 47 (1965).



And, Ernst Freund:

> "Legally, all zoning enabling acts contemplate the possibility of dezoning, the power to amend zoning ordinances serving that purpose. The provisions do not show on their face whether they are intended to remedy particular errors or hardships or whether they contemplate readjustments called for by the changing character of neighborhoods; undoubtedly, however, they may be made available for either purpose." Freund, *op. cit.* at 145.

State courts have understood this unique feature of the zoning process. Justice Levin of the Michigan Supreme Court, concurring in *Kropf* v. *City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974), observed:

> "For most communities, zoning as long range planning based on generalized legislative facts without regard to the individual facts has proved to be a theoretician's dream, soon dissolved in a series of zoning map amendments, exceptions and variances—reflecting, generally, decisions made on individual grounds—brought about by unanticipated and often unforeseeable events: social and political changes, ecological necessity, location and availability of roads and utilities, economic facts (especially costs of construction and financing), governmental needs, and, as important as any, market and consumer choice." *Id.* at 168 and 191-92.

Amici know of no other system of municipal law where the right to request a new set of rules for an individual is so dominant a feature. To our knowledge no building code allows a building owner to petition for relief from a requirement that all elevators have emergency brakes; no health code allows a restaurant owner to be exempt from minimum standards of cleanliness; no traffic code invites

a driver to be given a "variance" to go 50 mph in a 35 mph zone.

The American Law Institute has recently published *A Model Land Development Code,* the first such national prototype since The Standard State Zoning Enabling Act of 1922. The Reporters of that Code make the following observation:

> "A person who looks at the text of a zoning ordinance or the zoning map in order to ascertain the community's policies toward land use may be accumulating only meaningless information. As [Professor] Jan Krasnowiecki [Pennsylvania School of Law] has described it, 'the community's real land use policy comes to be expressed in the zoning amendment'." American Law Institute, *A Model Land Development Code,* Proposed Official Draft, April 15, 1975, Art. 4, p. 176 citing Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation* v. *Administrative Discretion,* in Marcus & Groves, eds., *The New Zoning: Legal, Administrative and Economic Concepts and Techniques,* 3, 6 (1970).

The distinction in zoning is apparent: compared to building, health and traffic codes which relate to "hard" issues of public health and safety, the zoning ordinance, as an exercise of the police power is constructed on more subtle considerations of public welfare and represents such a direct threat to constitutionally protected private rights in property that the opportunity to petition for change is imperative. This has been so recognized in a multitude of forms, from the simple zoning ordinances of the 1920's to the highly sophisticated ordinances of today.

> "Differential treatment is of the essence in American land use controls. Since by definition a formal and mechanical equality is out of the question, *the only way to provide the essence of equal treatment for these basic social interests is by an overall planning analysis*



> *of all the major factors bearing upon the situation.*" Williams, *op. cit.* note 1, Vol. 1, at p. 5. (Emphasis added.)

If opportunity for change is the distinctive feature of zoning, then the *process* by which a petition for change from the general law is deliberated, and the standards by which change is granted or denied become central to fairness, to what we now regard as due process of law. This essential fairness is imperative to keep secure the rights in property, whether these be the rights of the property owner who petitions for a change, or those of the neighboring property owners who believe a change will damage their land values as they perceive them.

> "Fourth, land use controls affect basic rights and sensitive issues more broadly. For the landowner (as resident, and as potential developer), this includes the right to use one's own land for various purposes, including many of those activities which make up a lifestyle—plus the chance to make money from using the land. For residents (landowners or tenants), in their role as neighbors, this involves the enjoyment of their homes, free from unpleasant intrusions resulting from neighboring land use." Williams, *op. cit.* note 1, Vol. 1, pp. 4-5.

Given this inherent character of the zoning process, it is a sardonic fact that the unbroken thread of criticism of zoning law, from the early days to date, has been its unfair process and its tendency to grant special favors or to refuse to correct patent inequities, without due deliberation. The literature of zoning carries the constant refrain that the process involved in the grant or denial of change by whatever local body—city council, plan commission or board of zoning appeals—has been devoid of elementary standards of fairness and forethought.

Twenty years ago the typical charge was that local agencies were too generous with special dispensations.

Walter Blucher, former Executive Director of the American Society of Planning Officials and one of the nation's most outstanding planning lawyers, put it this way:

> "The question must be asked seriously whether zoning, as it is currently being practiced, is endangering our democratic institutions.
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> • • •
>
> "There are several reasons for this degeneration of zoning. One is the failure to provide a really adequate land use plan or the comprehensive plan called for by many zoning statutes as the basis for zoning.
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> • • •
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> "Anarchy is the proper term for what is taking place . . . The spirit of zoning is being violated by legislative bodies." Blucher, *Is The Tail Wagging The Dog?*, in Planning (American Society of Planning Officials, 1955) pp. 96, 100.

In more recent years, as the use of zoning has been regarded by some critics as a device to keep out unwanted economic or racial groups, the criticism of the process has been that local legislative bodies have been too reluctant to grant changes, that zoning has become a method for preventing any change, however the property owner or others may be injured.

The Pennsylvania Supreme Court expressed this concern as follows:

> "Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future." *National Land Investment Co.* v. *Kohn*, 419 Pa. 504, 527-28, 215 A.2d 597, 610 (1965).



A commentator on the zoning process used more colorful terms:

> "The lack of accepted guidelines for determining what kind and rate of growth is best for a given community, the wide divergence of opinion between the developer and the no-growth proponents, and the highly emotional questions involved have, inevitably, given many recent hearings the flavor of an old-fashioned public hanging, with the developer on the destructive end of the rope.
>
> "In such confrontations, the local officials sit uncomfortably between the opponents. They are expected to summon the wisdom of Solomon (who never had to worry about re-election) in evaluating and ruling on the advisability of development vs. no development. Painfully aware that any acquiescence to the developer's point of view must be accompanied by the strongest possible justification in terms of environmental as well as economic good (lest they also be placed in the noose), elected officials often opt for the moratorium approach." O'Leary, *Growth vs. No-Growth: The Suburban Dilemma*, in Management and Control of Urban Growth, Vol. 1, p. 50 (Urban Land Institute, 1975).

Throughout zoning's history the criticism, whatever its tilt, has had a common theme: local zoning was abusive of due process, both procedurally and substantively.

> "Shorn of all pretentious planning jargon, zoning administration is exposed as a process under which multitudes of isolated social and political units engage in highly emotional altercations over the use of land, most of which disputes are settled by crude tribal adaptations of medieval trial by fire, and a few of which are concluded by confused *ad hoc* injunctions of bewildered courts." R. Babcock, *The Chaos of Zoning Administration*, 12 Zoning Digest 1 (1960).

*Euclid* sustained the principal of zoning. The opinion of this Court in *Nectow, supra*, demonstrated that the *Euclid*

decision had not been intended as a license to ignore standards of fairness and rationality in the process of making zoning decisions. This history of zoning since *Euclid* and *Nectow* reflects the growing concern and the increasingly successful effort of the state courts to bring reason, both substantive and procedural, to the zoning process.

It is the lack of deliberation and care, inevitable in a mandatory plebiscite, that is at issue in this cause.

**THE HISTORY OF ZONING, PARTICULARLY IN RECENT YEARS, REFLECTS THE INCREASINGLY EFFECTIVE EFFORTS OF STATE COURTS TO CORRECT ABUSES IN THIS USE OF THE POLICE POWER TO REGULATE LAND.**

Students of zoning history like to divide the development of zoning law into time periods, a somewhat artificial exercise but useful nevertheless to an understanding of where this system of law stands today.[11] In the more recent of these periods the state courts have demonstrated a suspicion that local decision-making frequently was not based upon the kind of careful analysis and study attributed to zoning by Bettman and assumed by the Court in *Euclid*. In response, the state courts have progressively imposed a greater burden of deliberation upon local decision-making bodies when they address individual requests for change.

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[11] See Babcock and Bosselman, *Exclusionary Zoning: Land Use Regulation and Housing in the 1970's*, Chapter 2 (Praeger Press, 1973). The authors suggest three periods. Williams, *op. cit.* note 1, Vol. 1 ch. 5, suggests four periods. Both texts agree that the early tendency of the state courts to be generous to developers then changed to one of a sympathy with municipal resistence to proposals for change, and in the past few years has shown a trend to regard local obduracy with skepticism.



Even when the courts—as they usually did—refused to read the customary statutory phrase "in accordance with a comprehensive plan" to mean that there must be a separate document such as a master plan on which the zoning ordinance was based, the courts at least agreed that the phrase does require changes in zoning to be based upon a rational, deliberative course of action and be free of the "capricious exercise" of power. *See Kozesnik* v. *Township of Montgomery*, 24 N.J. 154, 131 A.2d 1 (1957); and *Jablon* v. *Town Planning & Zoning Commission of Town of Newtown*, 157 Conn. 434, 254 A.2d 914 (1969).

The path the state courts have sought to blaze in an effort to bring a semblance of reason and fairness to the conflicting private interests involved in zoning changes has been tortuous and not always well marked. But such a trail is being cut and its course has become more apparent as zoning has become a major social and economic issue in this country.

The following judicial doctrines reflect this concern over what the zoning process is all about.

**1. The rule against "spot zoning."**

The development of the doctrine of the invalidity of "spot zoning" represented an early and crude effort by the courts to discourage the grant of special favors by local legislatures to one landowner at the expense of neighboring landowners.

The statement of the Supreme Court of New Jersey in *Linden Methodist Episcopal Church* v. *City of Linden*, 113 N.J.L. 188, 173 A. 593 (1934) is typical:

> "An attempt to wrench a single small lot from its environment and give it a new rating that disturbs the tenor of the neighborhood should receive the close

scrutiny of the courts lest the zoning enactments, constitutional and legislative, be directed from their true objectives. I conclude that the ordinance is not a reasonable exercise of municipal power." *Id.* at 191 and 595.

One of the country's most distinguished legal authorities on zoning explained "spot zoning" as follows:

> "If one developer receives a zoning amendment for apartment development in one quadrant [of an intersection], why can't another developer likewise receive a zoning amendment for apartment development in another quadrant? The situation suggests favoritism and discrimination and the courts are skeptical. They exhibit their skepticism by characterizing a rezoning of this kind as a 'spot' zoning, with overtones that it is presumptively invalid." Mandelker, *The Zoning Dilemma,* 72 (1971). See also Anderson, *The American Law of Zoning*, § 5.04-§ 5.13 (1968).

**2. The judicial concern that the balancing of private rights and the police power was too often a numbers game.**

The state courts have not only been concerned with the risk that the opportunity for zoning changes would be used to dispense special favors. The courts have been disturbed by growing evidence that refusals of local public agencies, legislative or administrative, to grant changes to petitioners were unduly influenced by popular pressures, by petitions with a multitude of signatures or by the number of objectors or the decibel level of their voices at public hearings. The following are illustrative:

*In Maryland:*

> "But in restricting individual rights by exercise of the police power *neither a municipal corporation nor the state legislature itself can deprive an individual*



> *of property rights by a plebiscite of neighbors or for their benefit.* . . . There is no magic in the word 'zoning,' but there is a wide difference between exercise of the police power in accordance with a comprehensive zoning plan which imposes mutual restrictions and confers mutual benefits on property owners, and arbitrary permission to A and prohibition to B to use their property, at the pleasure of neighbors or at the whim of legislative or administrative agencies." *Benner* v. *Tribbitt*, 190 Md. 6, 20, 57 A.2d 346, 353 (1948). (Emphasis added.) See also *Ford* v. *Baltimore County*, 268 Md. 172, 300 A.2d 204 (1973).

*In Florida:*

> "There must be a positive showing of physical, economic or social change rather than esthetic or group caprice to justify the release of zoning regulations. Neither will they be released at the behest of community or group pressure, if in doing so constitutional guarantees are undermined." *Siegel* v. *Adams*, 44 So. 2d 427, 428 (Florida 1950).

*In Indiana:*

> "The determination of a petition for a variance cannot be determined by a poll of the sentiment of the neighborhood." *Town of Homecroft* v. *Macbeth,* 238 Ind. 57, 63, 148 N.E.2d 563, 566 (1958).

*In Rhode Island:*

> "It is also not a proper exercise of such authority to base their decision [on a rezoning] merely on 'strenuous objections of residents of the Town' as [the Board] does in reason (3). Such remonstrances may be heard and taken into consideration but they may not be permitted to control the board's decision. *Heffernan* v. *Zoning Board,* 50 R.I. 26, 144 A. 674. A poll of the neighborhood to weigh the conflicting wishes of the residents or landowners in the vicinity is not the purpose of the hearing." *Kent* v. *Zoning Board of Town of Barrington,* 74 R.I. 89, 92, 58 A.2d 623, 624 (1948).

*In Louisiana:*

> "We are convinced from the testimony of the aldermen that the Board substantially based its decision denying the rezoning classification request on the objections voiced by some of the voters residing in the area.
>
> "This cannot be the basis upon which public officials are called upon to act." *Jemison* v. *City of Kenner,* 277 So. 2d 728, 730 (Louisiana 1973).

*In New York:*

In this case, the plaintiff's property was first rezoned to light industrial and then rezoned back to residential after considerable public protest was raised. The Court said:

> "The zoning power, as limited by the statutory grant, must operate in relation to use of land and not for the accomplishment of purposes extraneous to that relation. . . . In our opinion, the balance between the State and the individual was not properly maintained by imposing the burden of economic disadvantage on the respondent *to pacify* the anger of the protestants. . . ." *DeSena* v. *Gulde,* 24 App.Div.2d 165, 171, 265 N.Y.S.2d 239, 246 (1965). (Emphasis added.)

In other cases the courts have been offended by conduct at statutory public hearings which made a mockery of the deliberative process. By way of example:

*In Michigan:*

The Supreme Court overruled a denial for a zoning change, and stated that the Board had acted:

> ". . . under the impact of a completely committed audience reaction . . . the audience came thoroughly committed to blocking the construction of the plant . . . the crucial decision . . . was made by five members of the township board under the immediate impact of their constituents. *Certain-Teed Products Co.* v. *Paris Township,* 351 Mich. 434, 446, 88 N.W.2d 705, 711-712 (1958).



*In Georgia:*

> "The evidence in this complaint for injunctive relief shows 36 zoning petitions were scheduled to be heard before the Commissioners of Clayton County on October 11, 1972, at 7:30 o'clock p.m.; that the hearings continued until 3:30 o'clock a.m., October 12, 1972; that from 1,200 to 1,500 people were present to attend the public meeting; that the hearings were held in the commissioners' hearing room, which accommodates approximately fifty people; that there were three other larger rooms in the courthouse where the hearings could have been legally held; that people were packed so closely in the entire corridor outside the hearing room that those interested in various petitions could not get close to the door, much less inside the hearing room. Zoning is a matter of highest governmental business." Quoting with approval the findings of the trial court. *Pendley* v. *Lake Harbin Ass'n.,* 230 Ga. 631, 633-34, 198 S.E.2d 503, 505 (1973).

The state court judges in these cases sensed that the police power was based predominantly on a popularity contest, not on the deliberation and careful balancing of competing private and public interests that were presumed to justify zoning restrictions.

**3. The increasing judicial insistence that decisions to make or deny changes in the zoning ordinance show evidence of forethought and deliberation.**

> "What, in truth, was the warrant for the Board's action? We are not told. The Board says we do not have to be told." *Tireman-Joy-Chicago Improvement Ass'n* v. *Chernick,* 361 Mich. 211, 214, 105 N.W.2d 57, 58 (1960).

What has been taking place among the state courts in zoning cases appears to be a response to Justice Talcott Smith's protest in *Tireman-Joy.*

The New York Court of Appeals has provided one of the most thoughtful analyses of the way that zoning works and the necessity for deliberation when changes are proposed in an ordinance. That decision is *Udell* v. *Haas,* 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968). The local governing body had changed by an amendment to the map a parcel of land on the edge of the Village from a business zone to a residential zone. The court found that this act was not consistent with a long-established community policy of encouraging commercial development on the periphery of the municipality.

The court first returned to the origins of zoning:

> "Zoning is not just an expansion of the common law of nuisance. It seeks to achieve much more than the removal of obnoxious gases and unsightly uses. Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.
>
> "This fundamental conception of zoning has been present from its inception. The almost universal statutory requirement that zoning conform to a 'well-considered plan' or a 'comprehensive plan' is reflection of that view. . . . In exercising their zoning powers the local authorities must act for the benefit of the community as a whole following a *calm and deliberate consideration of the alternatives and not because of the whims of either an articulate minority or even a majority of the community. DeSena* v. *Gulde,* 24 A.D.2d 165, 265 N.Y.S.2d 239 [2d Dept., 1965]. Thus the mandate of the Village Law (§ 177) is not a mere technicality which serves only as an obstacle course for public officials to overcome in carrying out their duties. *Rather the comprehensive plan is the essence*



> *of zoning.* Without it, there can be no rational allocation of land use. It is the assurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll. . . .
>
> "*Moreover, the 'comprehensive plan' protects the landowner from arbitrary restrictions on the use of his property which can result from the pressures which outraged voters can bring to bear on public officials.*" *Id.* at 469 and 893-94. (Emphasis added.)

The Court, after referring extensively to Professor Haar's seminal article *In Accordance With a Comprehensive Plan, op. cit.* note 11, *supra,* said:

> "One of the key factors used by our courts in determining whether the statutory requirement has been met is whether forethought has been given to the community's land use problems." *Id.* at 470 and 894.

On the necessity of deliberation when changes are sought, the court added:

> "In recent years, many experts on land use problems have expressed the pessimistic views that the task of bringing about a rational allocation of land use in an evermore urbanized America will prove impossible. *But of one thing, we all may be certain. The difficulties involved in developing rational schemes of land use controls becomes insuperable when zoning or changes in zoning are followed rather than preceded by study and consideration.* By this statement, we do not mean to imply that the courts should examine the motives of local officials. What we do mean is that the courts must satisfy themselves that the rezoning meets the statutory requirement that zoning be 'in accordance with [the] comprehensive plan' of the community." *Id.* at 471 and 895. (Emphasis added.)

On the interest of the public at large in such private disputes the court commented as follows:

"These vague desires of a segment of the public were not a proper reason to interfere with the appellant's right to use his property in a manner which for some 20 odd years was considered perfectly proper. If there is to be any justification for this interference with the appellant's use of his property, it must be found in the needs and goals of the community *as articulated in a rational statement of land use control policies* known as the 'comprehensive plan.'" *Id.* at 476 and 899. (Emphasis added.)

In 1973 the New York Court of Appeals reaffirmed the *Udell* rationale in *Town of Bedford* v. *Village of Mount Kisco,* 33 N.Y.2d 178, 351 N.Y.S.2d 129 (1973):

"We have held that zoning changes must indeed be consonant with a total planning strategy, reflecting consideration of the needs of the community (*Udell* v. *Haas,* 21 N.Y.2d 463, 288 N.Y.S.2d 888, 235 N.E.2d 897). *What is mandated is that there be comprehensiveness of planning, rather than special interest, irrational ad hocery.* The obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan. Indeed sound planning inherently calls for recognition of the dynamics of change." *Id.* at 188 and 136. (Emphasis added.)

The Supreme Court of Washington in *Fleming* v. *City of Tacoma,* 81 Wash.2d 292, 502 P.2d 327 (1972), spoke in terms similar to the *Udell* opinion. The court underscored the importance of planning as evidence of rational decision-making when a zone change is under consideration:

"We have long passed the time when one may use his land as he wishes provided it creates no nuisance. The concentration of population and the infinite variety of modern land uses necessitate effective land use planning. The restrictions on use, inherent in zoning,



insure that if one uses his property in a way harmonious with the existing zoning codes, he will be free from the danger that the future use of his neighbor's land might be detrimental to or foreclose his own established use. *Decisions which amend or change conditions under existing zoning laws therefore require an extremely sensitive balance between individual rights and the public welfare."* Id. at 295 and 329. (Emphasis added.)

The Virginia Supreme Court, in *Board of Supervisors of Fairfax County* v. *Snell Construction Company,* 214 Va. 655, 202 S.E.2d 889 (1974) invalidated a rezoning of a 26-acre tract which reduced the permissible densities, a practice commonly referred to as "downzoning." In the course of its opinion the Virginia Supreme Court said:

"Under the private enterprise system, land use is influenced by the profit motive. Profit flows from investments of time, talent, and capital. Landowners venture investments only when the prospects of profit are reasonable. Prospects are reasonable only when permissible land use is reasonably predictable. The Virginia landowner always confronts the possibility that permissible land use may be changed by a comprehensive zoning ordinance reducing profit prospects; yet, the Virginia statutes assure him that such a change will not be made suddenly, arbitrarily, or capriciously *but only after a period of investigation and Community planning."* *Id.* at 658 and 892. (Emphasis added.)

In Michigan, the Supreme Court of that state followed a line of reasoning akin to that in *Udell* v. *Haas.* In *Raabe* v. *City of Walker,* 383 Mich. 165, 174 N.W.2d 789 (1970), homeowners challenged the validity of a zoning amendment which reclassified neighboring property from agriculture to industrial. The court noted the statutory requirement that zoning be "in accordance with" a plan. The

court held that the absence of a plan was a major consideration when it invalidated the amendment:

> "The absence of a formally adopted municipal plan, whether mandated by statute or not, does not of course invalidate municipal zoning or rezoning. But it does as in *Biske, supra,* [*Biske* v. *City of Troy,* 381 Mich. 611, 166 N.W.2d 453 (1969)] weaken substantially the well-known presumption, which, ordinarily attends any regular-on-its-face municipal zoning ordinance or amendment thereof. This is particularly true of an ordinance purposed toward contradictory rezoning, after years of original zoning upon which concerned persons have come to depend." (At 178, 796)

An intermediate Illinois court has considered the relationship of planning and forethought to zoning changes and has held that the lack of planning and deliberation weakens the presumption of validity that usually attaches to municipal zoning decisions. In *Forestview Homeowners Ass'n, Inc.* v. *County of Cook,* 18 Ill. App. 3d 230, 309 N.E.2d 763 (*Leave to Appeal den'd,* 56 Ill.2d 582 (1974)) the court held:

> "There is recurring recognition that a comprehensive plan is a factor to be considered in determining the validity of an amendatory ordinance adopted by the zoning authorities of a county.
>
> • • •
>
> "A comprehensive zoning plan is a scheme or formula of zoning that reasonably relates to the regulation and restriction of land uses including establishment of districts therefore, to the health, safety and welfare of the public, and thus to the police power. *Hadley* v. *Harold Realty Co.* (1964), 97 R.I. 403, 408, 198 A.2d 149. It is a plan relevant in determining whether a zoning change is in harmony with the orderly utilization of property in a locality.



> "'Zoning necessarily involves a consideration of the community as a whole and a comprehensive view of its needs.' (*City of Aurora* v. *Burns,* 319 Ill. 84, 95, 149 N.E. 784; 1 Rathkopf, The Law of Zoning and Planning 9-1 (3d ed. 1972); Haar, In Accordance With a Comprehensive Plan, 68 Harv. L. Rev. 1154, 1170 (1955). This being so, we are constrained to agree that *the failure of Cook County to plan comprehensively* for the use and development of land in its unincorporated areas, and its failure to relate its rezoning decisions to data files and plans of other related county agencies, *weaken the presumption of validity which otherwise would attach to a county zoning ordinance. Compare Udell* v. *Haas* (1968), 21 N.Y.2d 463, 288 N.Y.S. 2d 888, 235 N.E.2d 897; see Annot., 40 A.L.R. 3d 372." (*Id.* at 240, 241, 243, 771, 773) (Emphasis added.)

Finally, an Ohio Appellate court has set forth the quality of deliberation and planning that must support the zoning process in that state:

> "Zoning classifications must be based on a comprehensive plan for the development of a governmental unit. Such a plan requires the gathering and analysis of data on existing land uses and the reasonably foreseeable needs based upon population, economics, living and transportation patterns, and all the many factors that do, or may in the future, affect the unit's physical development. Washington Township's geographical area was created for political and governmental purposes. As to its land use, it is on the fringe of a large and rapidly growing major metropolitan complex. In that context it is a very small part of a very large population center. Great portions of the township are presently undeveloped, but its population and construction rates face rapid increases. Yet in the appellant's evidence there is a great dearth of qualified expert opinion to establish the relationship or place of this small township's growth to the general

conditions which are affecting it. On the contrary, it is difficult to escape the feeling that the zoning scheme here was largely developed by township officials with an insular outlook and without substantial professional advice. While the burden of proof was on the plaintiff-appellee, the failure of appellant's evidence to establish any substantial underlying basis for the 'plan' of the township's development has considerable bearing in determining the manifest weight of the evidence." *Grant* v. *Washington Twp.*, 1 Ohio App. 2d 84 at 87, 203 N.E.2d 859 at 861-862 (1963). *See also Garber* v. *Joseph Silken & Co.*, 33 Ohio Misc. 178, 293 N.E.2d 333 (1972).

These recent cases are no more than illustrations of the growing body of state court decisions which insist that *the process by which change is considered* and which particularly affects selected owners of private property must be based upon a considered balancing of private rights and the public interest.

**4. The judicial view, supported by state legislative revisions, that the zoning process be based upon a separate and comprehensive plan.**

In *City of Louisville* v. *Kavanaugh*, 495 S.W.2d 502 (Ky. 1973), the Court of Appeals of Kentucky held that a refusal of the city's legislative body to rezone a parcel of land from single-family residential to multiple-family was invalid because that refusal was inconsistent with a land use plan enacted separately from the zoning ordinance:

"The record before the planning commission and the legislative body conclusively demonstrated that the existing [single family] zoning classification was not appropriate. It had been found that the R-5 zoning classification was inappropriate from a planning standpoint by the adoption of the comprehensive land use plan. The recommendation of the planning commission was to bring the zoning category in conformity with the previous finding made in the plan." *Id.* at 505.



Two earlier Kentucky decisions were cited by the court as support for its opinion. *Ward* v. *Knippenberg*, 416 S.W.2d 746 (Ky. 1967), and *Fallon* v. *Baker*, 455 S.W.2d 572 (Ky. 1970).

The decision on the importance of a separate master plan which has probably received the most attention is *Fasano* v. *Board of County Commissioners of Washington County*, 264 Ore. 574, 507 P.2d 23 (1973). In the course of passing upon the validity of a zoning change, the Supreme Court of Oregon commented extensively upon the nature of the comprehensive plan.

"The basic instrument for county or municipal land use planning is the 'comprehensive plan.' Haar, In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. 1154 (1955); 1 Yokley, Zoning Law and Practice, § 3-2 (1965); 1 Rathkopf, The Law of Zoning and Planning, § 9-1 (3d ed. 1969). The plan has been described as a general plan to control and direct the use and development of property in a municipality. *Nowicki* v. *Planning and Zoning Board*, 148 Conn. 492, 172 A.2d 386, 389 (1961).

• • •

"Although we are aware of the analytical distinction between zoning and planning, it is clear that under our statutes the plan adopted by the planning commission and the zoning ordinances enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land use control. *The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles.*" *Id.* at 582 and 27. (Emphasis added.)

Disputes over particular changes are essentially disputes between private interests—neighbors versus the applicant. The plan, when adopted independently of the ordinance, whether it consists of stated policies or maps, or both, serves as a benchmark against which to measure the consistency and fairness (the due process) of the action taken in these particularized and often heated disputes.

A more complete list of cases where the state courts have stressed the importance of planning as a protection against arbitrariness appears in the Appendix to this Brief.

The state courts have perhaps moved with greater speed than the state legislatures to make more certain that the balance between the police power and private rights is maintained through planning. Today, however, significant steps are being taken by state legislatures to mandate in more precise language than the 1922 Standard Zoning Enabling Act that the use of the zoning power be based upon planning—that is, upon forethought. A synopsis of these state legislative reforms appears in the Appendix to this Brief. We may expect a more strenuous insistence by state legislatures that the zoning process have a more equitable foundation based on planning, particularly with increased federal encouragement of comprehensive planning. *See* Housing Act of 1954, § 701, 40 U.S.C. § 461 (1970).

**5. The recent judicial view that when a local legislature acts upon a petition for a zoning amendment it is engaged in an adjudicatory process.**

The traditional rubric in zoning law had been that an amendment to the zoning ordinance, because it is granted by the local legislature, is a "legislative" act. *See, e.g., Johnston* v. *City of Claremont,* 49 Cal.2d 826, 323 P.2d 71 (1958); Mandelker, *Delegation of Power and Function in Zoning Administration,* 1963 Wash. U.L.Q. 60.



The most recent effort by courts to bring greater fairness and to reduce the risk of arbitrariness in the zoning change process appears in those cases which have rejected this conventional view. These courts insist that in such individual requests the local legislature is acting as an adjudicative body to resolve particular disputes. Therefore, the standards of disclosure, record keeping and impartiality which it must meet are those traditionally expected of administrative bodies. The evolution of this approach has roots both in the judicial suspicion of the favoritism underlying "spot zoning," and in the fear of undue pressure by opponents of a proposed change.

In these cases the courts have drawn a distinction between the role of the legislature when it adopts a comprehensive zoning ordinance or a plan, applicable to all, and when the same legislature makes decisions on requests by individuals for particular changes from the general scheme.

The *Fasano* decision, *supra,* has one of the strongest opinions on the different roles of the local legislative body in each of these instances:

> "Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its property is subject to an altogether different test." *Id.* at 580, 581 and 26.

The Supreme Court of Washington made the same sort of distinction a year before *Fasano* in *Fleming* v. *City of Tacoma,* 81 Wash. 2d 292, 298, 502 P.2d 327, 331 (1972):

> "Zoning decisions may be either administrative or legislative depending upon the nature of the act.

[Citing cases.] But, whatever their nature or the importance of their categorization for other purposes, zoning decisions which deal with an amendment of the code or reclassification of land thereunder must be arrived at fairly. The process by which they are made, subsequent to the adoption of a comprehensive plan and a zoning code, is basically adjudicatory.

"Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.

"Another feature of zoning amendment decisions, which distinguishes them from other types of legislative action, is their localized applicability. Other municipal ordinances which affect particular groups or individuals more than the public at large apply throughout an entire geographic area within the municipal jurisdiction, whereas ordinances that amend zoning codes or reclassify land thereunder apply only to the immediate area being rezoned.

"*Decisions which amend or change conditions under existing zoning laws therefore require an extremely sensitive balance between individual rights and the public welfare.*" *Id.* at 295 and 329, 331. (Emphasis added.)

In October, 1975 the Colorado Supreme Court in *Snyder* v. *City of Lakewood,* 542 P.2d 371 (1975) made the following distinction:

"In a challenge to a general zoning ordinance, the outcome turns on the exercise of the police power as bearing a reasonable relation to the public health,



safety, morals or welfare, *Euclid* v. *Ambler Realty Co., supra,* while the real issues involved in a rezoning case focus on the reasonableness of City Council's application of the statutory criteria *to the evidence presented.*" (Emphasis added.)

The Colorado court acknowledged that the traditional label of a "legislative" act was misplaced when the issue was a rezoning:

"Although our early decisions viewed the enactment of *rezoning* ordinances as a legislative function, the more recent decisions have held such activity to be a quasi-judicial function and reviewable under Rule 106(a)(4). In so doing, we have distinguished between the adjudicative process involved in enacting a *rezoning* ordinance and the legislative process involved in passing the general zoning ordinance. [Omitting footnotes.] This distinction was concisely drawn by the Supreme Court of Washington in *Fleming* v. *Tacoma,* 81 Wash.2d 292, 502 P.2d 327 (1972)" [cited *supra,* p. 33].

See also *Dillon Companies, Inc.* v. *City of Boulder,* 183 Colo. 117, 515 P.2d 627 (1973); and *Wheeler* v. *County of Adams,* 519 P.2d 327 (Colo. 1974).

The rationale of these cases has been replicated in other recent decisions in which the courts have rejected the traditional rule that any act by a legislature is legislative and not subject to standards. These courts recognize that in *rezoning* cases what is most often at stake is a dispute between competing private interests, on the one side the petitioner, on the other side the neighbors. *See, e.g., West* v. *City of Portage,* 392 Mich. 458, 221 N.W.2d 303 (1974); *Forman* v. *Eagle Thrifty Drugs and Markets,* 89 Nev. 533, 516 P.2d 1234 (1973).

This recognition by state courts of what is really going on in disputes involving zoning changes, in fact, is not all that recent. Courts have recognized for two decades that in such cases *private* interests are at issue. *See, e.g., Kelley* v. *John,* 162 Neb. 319, 75 N.W.2d 713 (1956); *Aldom* v. *Borough of Roseland,* 42 N.J. Super. 495, 127 A.2d 190 (1956).[12]

It is not the purpose of *amici* to argue whether the grant or denial of a zoning change is "administrative" or "legislative." What is significant is not the label attached to the process of acting upon petitions for change in zoning but the reason why the courts are responding in such fashion. This is one more link in the protective chain of due process, both substantive and procedural, that the state courts are constructing in the field of land use law.

In these ways the state courts are fashioning and requiring standards in the zoning process which would be consistent with the commands of the XIV Amendment to the Federal Constitution. It is in that context that planning (*e.g.*, forethought, deliberation, analysis) provides a constitutional shield against capricious action by the ma-

[12] "The freedom from accountability of the municipal governing body may be tolerable in those cases where the legislature is engaged in legislating but it makes no sense where the legislature is dispensing or refusing to dispense special grants. When the local legislature acts to pass general laws applicable generally it is performing its traditional role and it is entitled to be free from those strictures we place upon an agency that is charged with granting or denying special privileges to particular persons. When the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect from a traditional administrative agency." R. Babcock, *The Zoning Game* 158 (Univ. Wis. Press, 1966).



jority at the expense of the minority in the land use process.[13]

Without the forethought and deliberation that planning compels, the delicate constitutional balance on which the law of zoning is bottomed would be overturned. The Eastlake charter provision threatens the deliberative process that Bettman described in his brief, that this Court in *Euclid* understood, and that the state courts these last fifty years have been striving to bring to the zoning process.

For these reasons state courts, in addition to the Ohio Supreme Court, have not been sympathetic to referenda on zoning changes.[14]

## TO SUBJECT LAND USE DECISIONS WITH RESPECT TO PARTICULAR TRACTS OF LAND TO REFERENDUM IS A DENIAL OF DUE PROCESS BECAUSE IT UNDERMINES THE ASSURANCE OF FAIRNESS THAT IS THE PRODUCT OF PRIOR PLANNING.

The risk of a capricious or whimsical decision with respect to any specific request for rezoning of a particular

[13] There are, of course, many other persuasive reasons of public polity, fiscal, social and aesthetic, for urban planning. As one might surmise, there are also disagreements among professional planners on the appropriate scope and nature of the planning process. We are concerned here with one role of planning: as a means better to ensure that there is a fair allocation of a reciprocity of benefits among landowners who are subject to restrictions on the right to use their land.

[14] This brief has focused almost exclusively on zoning decisions of state courts. This reflects the history of zoning during the past fifty years. Only a very few of the more than 10,000 zoning decisions have been brought in the federal courts. Zoning, therefore, is a field of law where the burden of understanding the process and its ills has fallen almost exclusively within state courts.

tract of land is always present. As we have seen, the presence of that risk has increasingly led the state courts to insist on evidence of careful, comprehensive planning as their best assurance that a particular land use decision protected individual rights and responded to the genuine needs of the public instead of to irrelevant considerations such as who made the request or how numerous, vocal or well-organized objections were. If every rezoning *must* be the subject of a referendum, then the deliberative process that is embodied in comprehensive planning is frustrated and the vitality of the plan debilitated.

The decision of the Ninth Circuit in *Southern Alameda Spanish Speaking Organization (SASSO)* v. *City of Union City,* 424 F.2d 291 (9th Circuit, 1970), illustrates that risk. In that instance SASSO successfully sought the rezoning of a tract of land to a multi-family classification to permit the construction of a federally financed housing project for low and middle income families. The rezoning was consistent with a draft master plan which, according to the court, had been in large part accepted by its city officials who had "informally abandoned the 1962 plan's designation of appropriate future use in favor of the updated designations regarded as more appropriate in light of its city's growth." Almost immediately after the rezoning was approved, it was nullified by a city-wide referendum. The Court of Appeals rejected the contention that the application of referendum procedures to rezoning violated due process requirements, saying:

> "A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." (424 F.2d at 294)



What the Ninth Circuit failed to appreciate was that the referendum in *SASSO* did not involve the draft master plan as a whole but was instead simply an item veto of one land use recommendation in the plan. If the referendum process may be used to nullify decisions that are consistent with the master plan, then the result is not "the city itself legislating through its voters." Instead it is the city stultifying itself.

The state courts have been, for the most part, less rhapsodic about the virtues of referendums when the issue has been the zoning classification of a particular parcel of land. Thus the state decisions emphasize the distinction between a referendum on a general plan or a comprehensive zoning ordinance and a decision with respect to the zoning of a specific piece of land. The decision of the Minnesota Supreme Court in *Minneapolis Honeywell Regulator Co.* v. *Nadasdy,* 247 Minn. 159, 76 N.W. 2d 670 (1956), a proceeding in mandamus to compel a village council to issue a building permit, is an instructional example. Although the pertinent enabling legislation contained a proviso that alterations in zoning plans were to be made only upon two-thirds vote of the local governing body, the Minnesota court did not rely solely on the conflict between the statutory provisions for referendum and the specifics of the zoning legislation. Instead, the court went on to hold:

> "While the referendum provision of the statute has not heretofore been construed by this court, we believe that the reasonable and proper construction of the statute supports the position of the plaintiff to the effect that the referendum-election provision applies only to a comprehensive type of zoning ordinance and does not apply to an altering or amending ordinance." (247 Minn. at 165, 76 N.W.2d at 675)

The Nevada Supreme Court expressed a similar opinion in *Forman* v. *Eagle Thrifty Drugs and Markets, Inc.*, 89 Nev. 533, 516 P.2d 1234 (1973):

> "We think that whether or not the citizens of a state wish to embark upon a policy of zoning for the purpose of regulating and restricting the construction and use of buildings within fixed areas is a legislative matter subject to referendum. But when, as in the present case, such policy has been determined and the changing of such areas, or the granting of exceptions has been committed to the planning commission and the city council in order to secure the uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance, such action is administrative and not referable." (89 Nev. at 537-8, 516 P.2d at 1237)

See also: *O'Loane* v. *O'Rourke*, 231 Cal. App.2d 774, 42 Cal. Rptr. 283 (1965).[15]

The more recent state decisions that have considered the applicability of referendum provisions to the rezoning of

[15] There are a parallel group of decisions that involve the question of whether the initiative process may be used to adopt or amend zoning regulations. These decisions involve the additional complication of whether the initiative process violates due process by omitting the notice and hearings that would otherwise be required. *City of Scottsdale* v. *Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968), *Smith* v. *Township of Livingston*, 106 N.J. Super. 444, 256 A. 2d 85 (1969) and *Dewey* v. *Doxey-Layton Realty Co.*, 3 Utah 2d, 1277 P.2d 805 (1954) with *San Diego Building Contractors Ass'n* v. *City Council of the City of San Diego*, 118 Cal. Rptr. 146, 529 P.2d 570 (1974) and *Builders Ass'n of Santa Clara-Santa Cruz Counties* v. *Superior Court of Santa Clara County*, 118 Cal. Rptr. 158, 529 P.2d 582. And cf. *Associated Home Builders of Greater Eastbay, Inc.* v. *City of Livermore*, 41 Cal. App. 3d 677, 116 Cal. Rptr. 326 (1974).



particular tracts of land have rejected the claim that such decisions are "legislative" in any meaningful sense of that word.[16] Decisions with respect to zoning limitations on a particular piece of land are more administrative or adjudicative than legislative because they involve the land of private interests in the use of land (*i.e.*, the landowner vs. his neighbors) and also because, when there is a plan, the consistency of the proposed rezoning with the plan must be evaluated.

As the Nevada Supreme Court expressed the distinction, in *Forman* v. *Eagle Thrifty Drugs and Markets, supra:*

> "This legislative-administrative dichotomy is often vague, but it is this very vagueness which has given the courts considerable leeway in balancing two competing interests: that of protecting government from unwarranted harassment and the equal interest in protecting benefits to be won through direct legislation." (At 537 and 1236)

In circumstances that are very similar to this case, the Michigan Supreme Court ruled in *West* v. *City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974), that an amendment to a city zoning ordinance changing the zoning with respect to a particular piece of property was not subject to a referendum. The court held:

[16] There are older decisions that hold the referendum process applicable without considering all of the implications of the rule. See, *Dwyer* v. *City Council of Berkeley*, 200 Cal. 505, 253 P. 932 (1927); *Jackson* v. *Denver Producing and Refining Co.*, 96 F.2d 457 (10th Cir. 1938), and *State ex rel. Hunzicker* v. *Pulliam*, 168 Okla. 632, 37 P.2d 417 (1934). (The latter two decisions involve the same Oklahoma City Ordinance that extended the zone in which oil wells could be drilled.)

"The issue is whether an amendment to a city zoning ordinance changing the zoning of particular property is subject to a referendary vote of the electors of the city.

"We hold that such a change in zoning is not subject to a referendum. The right of referendum extends only to legislative acts. A change in the zoning of particular property, although in form (amendment of a zoning ordinance) and in traditional analysis thought to be legislative action, is in substance an administrative not legislative, act." (342 Mich. at 460-61, 221 N.W.2d at 304)

In the *West* decision the Michigan court relied upon similar decisions from other jurisdictions, including *Kelley* v. *John,* 162 Neb. 319, 75 N.W.2d 713 (1956) and *Bird* v. *Sorenson,* 16 Utah 2d 1, 394 P.2d 808 (1964). In *Kelley* the Nebraska Supreme Court held:

"An ordinance changing the classification of property from residential to business use after the adoption of a comprehensive zoning plan is an administrative or executive matter, and not subject to referendum laws applicable to municipalities." (162 Neb. at 319, 75 N.W.2d at 714)

And in *Bird* the Utah court agreed:

"The City of Washington Terrace has in effect a master zoning plan ordinance. Subsequent to its adoption, the City Council passed an ordinance changing the classification of certain property from residential to commercial use.

• • •

The ordinance in question was passed after the requested change had been studied and recommended by the planning commission and after a public hearing had been held. The determinative question is whether or not the action of the City Council *was administrative or legislative. If the former, it is not subject to referendum.* We so hold, based upon logic and prior decisions of this court. *If each change in a zoning classification were to be submitted to a vote of the city electors, any master plan would be rendered inoperative. Such changes are administrative acts implementing the comprehensive plan and adjusting it to current conditions."* (16 Utah 2d at 1-2, 394 P.2d at 808.) (Emphasis added.)



A New York court explained why the referendum provision is inherently inconsistent with comprehensive planning:

"It may be noted that the sections of the General City Law and similar ones in the Town Law, [§§261, 265] and the Village Law, [§§175, 179] set forth a method and procedure, State-wide in operation, by which municipalities may avail themselves of the right to zone the land within their boundaries. These statutes require that any zoning law shall be based on a well-considered and comprehensive plan by means of which the land in the municipality may be used for purposes for which it is best suited and all reasonably necessary uses may be provided for. If, after the adoption of a zoning ordinance, meeting these requirements, some of its provisions may be deleted by a referendum of the electors, the comprehensiveness mandated by the Legislature could well be destroyed. Essential uses, such as for churches and schools, could be barred from the municipalities.

In the instant case, while the Common Council may comply with Section 83 of the General City Law in amending the New Rochelle Zoning Ordinance, as it here did, its legislation and the city's compliance with the said section could be completely nullified if such acts were subject to a referendum of the electors of the city. This would create, as it has here, a situation where there has been formal but ineffective compliance. This would exalt form above substance." *Elkind* v. *City of New Rochelle,* 5 Misc. 2d 296, 301-302, 163 N.Y.S. 2d 870, 876-77 (1957); aff'd 5 N.Y.2d 836, 181 N.Y.S. 2d 509 (1958)

The impact of land use restrictions on private rights in property is often severe—for the owner of the restricted parcel if change cannot be secured, for the owners of nearby land if the restrictions are altered. Each is entitled to expect that due process guarantees will protect him from having his land, or its value, arbitrarily impaired.

The insistence of the courts upon that process of forethought and analysis called comprehensive planning as the central test of fairness will come to nothing if the plan can be overridden by referenda with respect to the use and classification of particular pieces of property. There is no surer way to destroy the guarantees of due process that have been built into land use regulation by the state courts, and co-incidentally, to compel ever increasing resort to the judicial system to correct abuses of the local decision-making process in zoning.

## CONCLUSION

In the half a century since the decision in *Euclid* it has fallen to the state courts to put flesh on the frame of that decision which permitted restrictions on the Constitutionally-protected rights in private property in return for public benefits.

The judicial struggle with new concepts and a variety of techniques has not been without false starts, criticism and confusion, but ultimately these state courts have hammered out basic principles—principles necessary to balance an extension of the police power over the use of land with the rights of owners of private property.

Among the most important of these principles are two which have emerged from the mass of decisions during the past fifty years.



1. The process by which a comprehensive zoning ordinance is changed to respond to particular proposals must be in accordance with reasonably discernible standards in order to insure fairness and due process.

2. Comprehensive planning, whether reflected in a separate document or by other evidence of deliberation and forethought is an effective method to advance the requirement for such standards.

Since *Euclid,* comprehensive zoning ordinances have been adopted by thousands of American communities. The cutting edge of land use decision-making has become *how* and *when*—rather than *whether*—land use controls where were permissible.[17] The focus on the necessary standards has shifted to the making of *change* in the existing scheme.

There is no better summation of the position reached by state courts after a half century of case law than this statement by the Connecticut Supreme Court:

> "Balancing the preservation of the status quo with the reasonable pressures for change due to the growth in population and the onslaught of business needs and community requirements is a function of zoning which must best be resolved by the duly authorized legislative municipal body through a logical development of its comprehensive plan." *Jablon* v. *Town Planning & Zoning Commission of Town of Newtown,* 157 Conn. 434, 443, 254 A. 2d 914, 918 (1969).

It is just such a change which Respondent had sought from the City of Eastlake, a change which he had *successfully* achieved, after due deliberation, by plan commission and city council—until the operation of the Eastlake char-

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[17] F. Bosselman and D. Callies, *The Quiet Revolution in Land Use Control,* Council on Environmental Quality (G.P.O.) 1971, p. 2.

ter amendment. By the very operation of its terms—a mandatory popular referendum on each and every land use *change* in the city—all standards, all deliberative processes, all comprehensive planning—fifty years of zoning history —count for nothing. After the fullest consideration of the merits of a change in land use policy, individual property rights are effectively and completely nullified "by the superior force of an interested and overbearing majority'"[18] contrary to law, and contrary to the intent of the framers of our Federal system.

We respectfully submit that the decision of the Supreme Court of Ohio is correct, and accordingly it should be affirmed.

Respectfully submitted,

RICHARD F. BABCOCK
DAVID L. CALLIES
R. MARLIN SMITH

[18] *The Federalist*, No. 10.

# APPENDIX

## APPENDIX

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### I. ILLUSTRATIVE STATE COURT DECISIONS ON THE IMPORTANCE OF PLANNING TO ZONING

CALIFORNIA

*Cow Hollow Improvement Club* v. *Di Bene*, 245 Cal. App. 2d 160, 53 Cal. Rptr. 610 (1966)

*O'Loane* v. *O'Rourke*, 231 Cal.App.2d 774, 42 Cal. Rptr. 283 (Dist.Ct.App. 1965)

COLORADO

*Fontaine* v. *Board of County Commissioners of Adams County*, 493 P.2d 670 (Colo.Ct.App. 1972)

CONNECTICUT

*Jablon* v. *Town Planning & Zoning Commission of Town of Newton*, 157 Conn. 434, 254 A.2d 914 (1969)

*Nowicki* v. *Planning and Zoning Board of Town of Milford*, 148 Conn. 492, 172 A.2d 386 (1961)

*Rosenberg* v. *Planning Board of City of Stamford*, 155 Conn. 636, 236 A.2d 895 (1967)

*Tarasovic* v. *Zoning Commissioner of Town of Trumbull*, 147 Conn. 65, 157 A.2d 103 (1959)

DELAWARE

*Green* v. *County Planning and Zoning Commission of Sussex County*, 340 A.2d 852 (Del. 1974)

HAWAII

*Dalton* v. *City and County of Hawaii*, 51 Haw. 400, 462 P.2d 199 (1969)

ILLINOIS

*Forestview Homeowners Ass'n, Inc.* v. *County of Cook*, 18 Ill.App.3d 230, 309 N.E.2d 763 (*Leave to Appeal den'd*, 56 Ill.2d 582 (1974))

INDIANA

*Board of Zoning Appeals of City of Fort Wayne* v. *Shell Oil Co.*, 329 N.E.2d 636 (Ind. 1975)

*Carlton* v. *Board of Zoning Appeals of City of Indianapolis*, 252 Ind. 56, 245 N.E.2d 337 (1964)

*Suess* v. *Volgelgesang*, 151 Ind. A. 631, 281 N.E.2d 536 (1972)

IOWA

*F. H. Uelner Precision Tools & Dies, Inc.* v. *City of Dubuque*, 190 N.W.2d 465 (Ia. 1971)

KENTUCKY

*City of Louisville* v. *Kavanaugh*, 495 S.W.2d 502 (Ky. 1973)

*Fallon* v. *Baker*, 455 S.W.2d 572 (Ky. 1970)

*Fritts* v. *City of Ashland*, 348 S.W.2d 712 (Ky. 1961)

*Hines* v. *Pinchback-Holloran Volkswagen, Inc.*, 513 S.W.2d 492 (Ky. 1974)

*Hodge* v. *Luckett*, 357 S.W.2d 303 (Ky. 1962)

*Ward* v. *Knippenberg*, 416 S.W.2d 746 (Ky. 1967)

MAINE

*Barnard* v. *Zoning Board of Appeals of Town of Yarmouth*, 313 A.2d 741 (Me. 1974)

MARYLAND

*Aspen Hill Venture* v. *Montgomery County Council*, 265 Md. 303, 289 A.2d 303 (1972)

*Board of County Commissioners for Prince George's County* v. *Farr*, 242 Md. 315, 218 A.2d 923 (1966)



*County Council for Montgomery County* v. *District Land Corporation*, 274 Md. 691, 337 A.2d 712 (1975)

*Dustin* v. *Mayor and Council of Rockville*, 23 Md. App. 389, 328 A.2d 748 (1974)

*Heller* v. *Prince George's County*, 264 Md. 410, 286 A.2d 748 (1974)

*Howard Research and Development Corporation* v. *Zoning Board of Howard County*, 263 Md. 380, 283 A.2d 150 (1971)

*Montgomery* v. *Board of County Commissioners for Prince George's County*, 263 Md. 1, 280 A.2d 901 (1971)

*Montgomery County Council* v. *Leizman*, 268 Md. 621, 303 A.2d 374 (1973)

*Montgomery County Council* v. *Pleasants*, 266 Md. 462, A.2d 216 (1972)

*Norbeck Village Joint Venture* v. *Montgomery County Council*, 254 Md. 59, 254 A.2d 700 (1969)

*Park Construction Corporation* v. *Board of County Commissioners for Prince George's County*, 245 Md. 597, 227 A.2d 15 (1967)

*Sampson Brothers (Md.), Inc.* v. *Board of County Commissioners of Prince George's County*, 240 Md. 116, 213 A.2d 289 (1965)

*Scull* v. *Coleman*, 251 Md. 6, 246 A.2d 223 (1968)

*Valencia* v. *Zoning Board of Howard County*, 270 Md. 478, 312 A.2d 277 (1973)

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*Deans* v. *West*, 189 Neb. 518, 203 N.W.2d 504 (1973)

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*Golden* v. *Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972)
*Heram Holding Corporation* v. *City of Albany*, 63 Misc. 2d 152, 311 N.Y.S. 2d 198 (1970)
*Town of Bedford* v. *Village of Mount Kisco*, 33 N.Y. 2d 178, 351 N.Y.S. 2d 129 (1973)
*Udell* v. *Haas*, 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968)

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*Garber* v. *Joseph Silken and Company*, 33 Ohio Misc. 178, 293 N.E. 2d 333 (1972)
*Grant* v. *Washington Township*, 1 Ohio App.2d 84, 203 N.E.2d 859 (1963)

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*Archdiocese of Portland* v. *County of Washington*, 254 Or. 77, 458 P.2d 682 (1969)
*Baker* v. *City of Milwaukie*, 533 P.2d 772 (Or. 1975)
*Culver* v. *Dagg*, 532 P.2d 1127 (Or. 1975)



*Dickinson* v. *Board of County Commissioners of Clackamas County*, 533 P.2d 1395 (Or. 1975)
*Duddles* v. *City Council of West Linn*, 535 P.2d 583 (Or. 1975)
*Fasano* v. *Board of County Commissioners of Washington County*, 264 Or. 574, 507 P.2d 23 (1973)
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*Roseta* v. *County of Washington*, 254 Or. 161, 458 P.2d 405 (1969)
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*Cleaver* v. *Board of Adjustment of Tredyffrin Township*, 414 Pa. 367, 200 A.2d 408 (1964)
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*Pollack* v. *Zoning Board of Adjustment*, 342 A.2d 815 (Pa. 1975)
*Schubach* v. *Silver*, 336 A.2d 328 (Pa. 1975)

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*Toole* v. *May-Day Realty Corporation*, 101 RI 379, 223 A.2d 545 (1966)

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*Board of Supervisors of Fairfax County* v. *Snell Construction Co.*, 214 Va. 655, 202 S.E.2d 889 (1974)
*Southern Ry. Co.* v. *City of Richmond*, 205 Va. 699, 139 S.E.2d 82 (1964)

WASHINGTON

*Sonneland* v. *City of Spokane*, 4 Wash. App. 865, 484 P.2d 421 (1971)

*State ex rel. Randall* v. *Snohomish County*, 79 Wash. 2d 619, 488 P.2d 511 (1971)

II. STATUTES REVISING AND STRENGTHENING THE REQUIREMENT FOR PLANNING AS A FOUNDATION FOR REGULATION OF LAND

ALASKA

Alaska Stat. Title 29 ch. 33, § 29.33.085(b) (1972) "The assembly shall adopt a comprehensive plan based upon the recommendation of the planning commission."

Alaska Stat. Title 29 ch. 33, § 29.33.090(a) (Supp. 1975) "In accordance with the comprehensive plans the assembly shall regulate and restrict the use of land. . . ."

ARIZONA

Ariz. Rev. Stat. Ann., § 9-461.05 A. (Supp. 1975) "Each planning agency shall prepare and the legislative body of each municipality shall adopt a comprehensive, long-range general plan for the development of the municipality."

Ariz. Rev. Stat. Ann., § 9-462.01 E (Supp. 1975) "All ordinances of regulations adopted under this article shall be consistent with the adopted general and specific plans of the municipality, if any, as adopted under Article 6."

CALIFORNIA

Cal. Code Ann., Government Code, Title 7, Art. 5 § 65300 (West. 1966) "Each planning agency shall prepare and legislative body of each county and city shall adopt a comprehensive, long-term general plan . . ."

Cal. Code Ann., Government Code, Title 7, Art. 2 § 65860(a) 1975) "County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974."



Cal. Code Ann., Government Code, Title 7, Art. 2, § 65860(c) (West Supp. 1975) "In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to such a plan, such zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended."

DELAWARE

Del. Code Ann. Title 9, ch. 68, § 6807(a) (1975) "The commission shall prepare a plan as expressed in maps, figures, and text which shall, among other elements, include: . . . existing and proposed patterns and intensity of land use . . . ."

Del. Code Ann. Title 9, ch. 69, § 6904(a) (1975) "Regulations adopted by the county government pursuant to the provisions of this chapter, shall be in accordance with the approved comprehensive development plan . . . ."

DISTRICT OF COLUMBIA

Dist. of Col. Code Encyclopedia Ann. ch. 10, § 1-1002(a)(4)(D) (Supp. 1975-76) "The Commission and the Commissioners shall jointly publish, from time to time as appropriate, a comprehensive plan for the National Capital . . . ."

Dist. of Col. Code Encyclopedia Ann. ch. 4, §5-414 (Supp. 1975-76) "Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the National Capital . . . ."

FLORIDA

Fla. Session Laws ch. 75-257, § 4(2) (West. 1975) "On or before July 1, 1979, each county and each municipality in this state shall prepare and adopt a comprehensive plan . . . ."

Fla. Session Law ch. 75-257, § 12(1) (West 1975) "All land development regulations enacted or amended shall be consistent with the adopted comprehensive plan. . . ."

Fla. Session Law ch. 75-257, § 14 (West. 1975) "It is the intent of the act that the adoption and enforcement by a governing body of regulations for the development of land . . . shall be based on, related to, and a means of implementation for an adopted comprehensive plan as required by this Act."

HAWAII

Hawaii Rev. Stat., Title 13, ch. 205, §§ 205-1 to 15 (1968) and (Supp. 1974) These sections establish a state land use commission with responsibility for placing all land in the state within one of the following land use districts: urban, rural, agricultural and conservation. County governments may zone land within each of these land use districts except the conservation district which is governed by the department of land and natural resources.

IDAHO

Idaho Code Ann. § 67-6508 (Supp. 1975) "It shall be the duty of the planning or planning and zoning commission to conduct a comprehensive planning process designed to prepare, implement, and review and update a comprehensive plan, hereafter referred to as the plan."

Idaho Code Ann. § 67-6511 (Supp. 1975) "Each governing board shall . . . establish within its jurisdiction one (1) or more zones or zoning districts where appropriate. The zoning districts shall be in accordance with the adopted plan."

INDIANA

Ind. Stat. Ann. Title 18, ch. 2, § 18-7-2-31 (1974) "After the creation of the metropolitan planning department, the metropolitan plan commission shall as expeditiously as possible establish a comprehensive or master plan of the county. . . ."



KENTUCKY

Ken. Rev. Stat. ch. 100, § 100.201 (1971) "Cities and counties which are members of a planning unit which has adopted at least the objectives of the land use plan elements may divide the territory within their area of their jurisdiction into zones . . . ."

Ken. Rev. Stat. ch. 100, § 100.213 (1971) "Before any map amendment is granted, the planning commission or the legislative body or fiscal courts must find that the map amendment is in agreement with the community's comprehensive plan, or, in the absence of such finding, that one or more of the following apply . . . ."

MAINE

Maine Rev. Stat. Ann. Title 30 § 4962.1A (Supp. 1973) "Such [zoning] ordinance or provision shall be pursuant to and consistent with a comprehensive plan adopted by its legislative body."

NEBRASKA

Neb. Rev. Stat. ch. 19, § 19-901 (Supp. 1975) "For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative bodies in cities . . . and in villages may adopt zoning regulations. . . . Such powers shall be exercised only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan . . ., adopted such comprehensive development plan. . . ."

Neb. Rev. Stat. ch. 19, § 19-903 (Supp. 1975) "The regulations and restrictions authorized by sections 19-901 to 19-915 shall be made in accordance with a comprehensive development plan. . . ."

Neb. Rev. Stat. ch. 23, § 23-114.01 (2) (Supp. 1975) "The county planning commission shall prepare and adopt as its policy statement a comprehensive development plan. . . ."

Neb. Rev. Stat. ch. 23, § 23-114.03 (1974) "Zoning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board. . . ."

OREGON

Ore. Rev. Stat. ch. 197, § 197.175(2) (1973). "Pursuant to [various Oregon statutes] each city and county in this state shall:

(a) Prepare and adopt comprehensive plans consistent with state-wide planning goals and guidelines approved by the commission; and

(b) Enact zoning, subdivision and other ordinances and regulations to implement their comprehensive plans."

PENNSYLVANIA

Penn. Stat. Ann. Title 53 ch. 30 § 10703 (1972) "Every ordinance and all amendments thereto adopted pursuant to this article shall be based on and interpreted in relation to the comprehensive plan for the development of the municipality prepared under the provisions of this act."

WYOMING

Wyo. Stat. ch. 14, § 9-856(a) (Supp. 1975) "All local governments shall develop a land use plan within their jurisdiction. The plans shall be consistent with established state guidelines and be subject to review and approval by the commission."

MOTION FILED

DEC 31 1975

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1563

CITY OF EASTLAKE ET AL.,
*Petitioners,*

v.

FOREST CITY ENTERPRISES, INC.,
*Respondent.*

On Writ of Certiorari to the Supreme Court of Ohio

## MOTION OF SAN DIEGO BUILDING CONTRACTORS ASSOCIATION AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR AMICI CURIAE

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CITY OF EASTLAKE ET AL.,
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FOREST CITY ENTERPRISES, INC.,
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On Writ of Certiorari to the Supreme Court of Ohio

---

## MOTION OF SAN DIEGO BUILDING CONTRACTORS ASSOCIATION AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

---

San Diego Building Contractors Association and Associated General Contractors of America, San Diego Chapter, Inc., hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as amici curiae on the merits of the above-entitled case. Movants have requested the consent of the parties to the filing of this brief, but such consent has not been received.

The movant associations are non-profit corporations existing under and by virtue of the General Non-Profit Corporations Law of the State of California. Each has its principal place of business within the City of San Diego, California. Each has a membership composed of organizations and individuals who own real property within the City of San Diego and pay taxes thereon, and/or are engaged in or otherwise interested in the construction of buildings and improvements on real property within the City of San Diego.

The present case involves a challenge to a decision of the Supreme Court of Ohio holding unconstitutional a provision of a municipal charter requiring that any change in existing zoning, even though authorized by all appropriate municipal administrative and legislative bodies, must, as a precondition to effectiveness, be submitted to the general electorate in a referendum and receive a 55 percent affirmative vote. The case thus raises fundamental questions concerning the extent to which municipal zoning decisions that substantially affect the property rights of landowners may constitutionally be made by a vote of the electorate.

As organizations comprised of landowners and persons engaged in improving real property in the City of San Diego, the movant associations are vitally interested in the outcome of this case. If the decision below is not upheld, the property rights of their members could be significantly infringed by zoning decisions made through the electoral process, which would subject the property owners involved to the potentially arbitrary, capricious, and discriminatory whim of the voters, uncontrolled by any standards or other safeguards for ensuring the rationality of the decisions. This danger is of particular concern to the movants, because the San Diego City Charter and Elections Code authorizes the use of the initiative and referendum processes for the enact-



ment of ordinances. The movants therefore have a strong interest in supporting the balance struck by the court below between the Due Process Clause of the Fourteenth Amendment and popular elections.

In addition, the movant organizations have another, more direct interest in the outcome of this case. They are appellants in *San Diego Building Contractors Association et al.* v. *City Council of the City of San Diego*, No. 74-1459, which is now pending in this Court. That case presents the question of the constitutionality of the use of popular initiative process to enact a zoning ordinance. Pursuant to San Diego's initiative procedure, the city council, upon the petition of 10 percent of the voters, submitted to the voters at a general election a proposed ordinance prescribing a 30-foot height limitation for all buildings to be constructed within a prescribed "Coastal Zone" in San Diego. A majority of the voters voted for the adoption of that ordinance. Movants then brought suit on the ground that the enactment of that zoning ordinance through popular initiative, without notice or hearing for the affected property owners, violated the Due Process Clause of the Fourteenth Amendment. By a 4-3 vote, the California Supreme Court rejected that contention. 13 Cal. 3d 205, 118 Cal. Rptr. 146 (1974). Movants have appealed to this Court.*

The issues and arguments raised in that case are related, although not identical, to those in the present case. The movants therefore have a direct and particular stake in the outcome of the present case and in supporting affirmance of the decision below.

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* Appellants filed their Reply Brief therein on September 23, 1975; but to date the Court has not acted on the appeal.

Wherefore, San Diego Building Contractors Association and Associated General Contractors of America, San Diego Chapter, Inc., respectfully request leave to file the accompanying brief as amici curiae in support of the judgment of the court below.

Respectfully submitted,

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IN THE
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**On Writ of Certiorari to the Supreme Court of Ohio**

## BRIEF FOR AMICI CURIAE SAN DIEGO BUILDING CONTRACTORS ASSOCIATION AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC.

### INTEREST OF AMICI CURIAE

The interest of the above-named amici curiae is fully set out in the preceding Motion for Leave to File Brief as Amici Curiae, which is incorporated by reference herein.

### STATEMENT OF THE CASE

The facts and proceedings below are adequately set forth in the Brief for Petitioners (pp. 4-5) and in the opinion of the Supreme Court of Ohio (Pet. for Cert., App. A, pp. 14-15).

## ARGUMENT

### THE MANDATORY REFERENDUM PROCEDURE DENIED THE RESPONDENT DUE PROCESS OF LAW BECAUSE IT DID NOT PROVIDE ADEQUATE NOTICE AND OPPORTUNITY FOR A MEANINGFUL HEARING BEFORE A RESPONSIBLE BODY.

The Fourteenth Amendment provides that no person shall be deprived of his property without due process of law. We will demonstrate that in the present case, where the zoning decision applied only to a single landowner and precluded a use already approved by the legislature, the Due Process Clause required prior notice and the opportunity for a meaningful hearing before the body responsible for making the decision; that Eastlake's mandatory referendum procedure did not afford the landowner such notice or chance for a meaningful hearing; that that procedure consequently denied the respondent due process of law; and that the decision of the court below so holding should therefore be affirmed.

#### I. This Court Has Recognized That the Due Process Clause Requires Protections Against the Potentially Arbitrary and Capricious Imposition of Restrictions on Land Use.

Inherent in the process of zoning is governmental restriction of a landowner's use of his property and often the consequent devaluation of that property. It can thus involve an infringement or deprivation of the landowner's property rights. Because of that potential, this Court, while acknowledging the state's power to impose zoning restrictions, has recognized the proposition that the Due Process Clause requires that such restrictions be rational and bear a substantial relation to the public health, safety, morals, or general welfare. *Nectow* v.



*City of Cambridge*, 277 U.S. 183, 188 (1928); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387, 395 (1926).

In order to ensure that zoning decisions meet these due process requirements, this Court has held that the legislature may not constitutionally permit those decisions to be made by others in such a way as to allow the imposition of zoning restrictions arbitrarily, unreasonably, or on the basis of whim. Thus, in *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912), the Court struck down a municipal ordinance which authorized the imposition of building setback lines on all property on any street simply upon the petition of the owners of two-thirds of the property abutting that street. The Court stated:

> "In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. . . . In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property owners to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously." *Id.* at 143-44.

Again, in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), this Court invalidated a zoning ordinance which allowed the establishment of philanthropic homes for the aged in residential zones, but made such use subject to the trustee's obtaining the written consent of the owners of two-thirds of the property within 400 feet of a proposed home. According to the Court:

> "[T]here is no legislative determination that the proposed building and use would be inconsistent with

public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. . . . There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. [Citation omitted.] The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank* v. *Richmond*, [*supra*]." *Id.* at 121-22.

**II. Due Process Required Notice and the Opportunity for a Meaningful Hearing Prior to the Zoning Decision Here.**

The petitioners and the State of California, as amicus, suggest that *Eubank* and *Roberge* are inapplicable here, and that the challenged referendum procedure in the present case could not have constituted a denial of the respondent's right to due process, because that procedure did not deprive the respondent of any right to use its property for the use which it proposed (Ptrs. Br. pp. 11-12; Calif. Br. pp. 4-5). In their view, the respondent was simply seeking for its economic benefit an alteration in the previously established zoning restriction of its property to industrial uses, and the voters' rejection of that alteration through the referendum merely left in effect the previous restriction.



This argument, however, ignores the impact of the Eastlake city council's action in passing the ordinance approving the respondent's requested change in the permitted use of its property. As the court below recognized (Pet. App. A, p. 23), that legislative action here makes this case parallel to *Roberge*. As in *Roberge*, this is not a case where the legislature, in its latest action, had completely prohibited the respondent's proposed use as "inconsistent with public health, safety, morals or general welfare" (*Roberge*, 278 U.S. at 121), and where the challenged referendum procedure was used simply to seek an exception to such legislative prohibition.[1] To the contrary, the legislative body here—the city council—had found that the proposed use "was in harmony with the public interest" (*id.*), and had specifically provided for and approved that use. Yet, again as in *Roberge*, the challenged procedure gave less than half the voters in the city the final "authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the [respondent] from using its land for the proposed" and legislatively approved use. *Id.* at 121-22.[2]

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[1] Thus, this case is not like *Thomas Cusack Co.* v. *Chicago*, 242 U.S. 526 (1917), relied on by the petitioners and California, where this Court upheld an ordinance that completely prohibited the erection of billboards on any residential block unless consent to an exception to that prohibition was first obtained from a majority of the owners of property fronting on the block.

[2] Moreover, even at the time when the respondent purchased the property in question, it at least had the expectation and right to be able to secure a change in the then-applicable zoning restriction solely through approval by responsible bodies—the city planning commission and the city council. It was not until after the respondent had bought the property and submitted an application for the zoning change that the mandatory referendum procedure was adopted. See Pet. App. A, p. 14 n. 1. Accordingly, the referendum procedure not only denied the respondent the use of its land in the manner specifically approved by the city council, but it denied the respondent the right, which it had when it purchased the property, to secure a zoning change through a rational process before a responsible body.

The referendum procedure thus deprived the respondent of significant property interests.[3] Consequently, under the Due Process Clause, such deprivation could not have been constitutional if carried out without due process. The question, then, is what procedural due process required in the present situation.

Since zoning directly and substantially restricts the use of a person's property and is therefore constitutional only if rational and substantially related to public health, safety, and welfare, special procedural safeguards must surround zoning decisions in order to ensure such rationality. As the court below stated:

> "Modern day authorities agree that some restrictions on the use of land are essential to orderly community development. But because the power to zone infringes upon the individual use of private property, the exercise of such authority has been carefully hedged with procedural and substantive safeguards." Pet. App. A, p. 16.

Thus, in *Eubank* and *Roberge*, this Court struck down land use restrictions imposed without any procedural safeguards by decisionmakers who were free to act solely in their own interest, arbitrarily, capriciously, or in a patently discriminatory way. In those cases, then, the Court recognized that some form of procedural protection was essential in the zoning process so as to prevent potentially arbitrary decisionmaking.

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[3] We note that the deprivation of property rights that occurred in *San Diego Building Contractors Association et al.* v. *City Council of the City of San Diego*, No. 74-1459, wherein amici are appellants, is beyond doubt. In that case, the voters by initiative imposed a 30-foot building height limitation on the property of a discrete group of landowners within a particular zone who were not previously subject to such restriction. See p. 3, *supra*. That vote thus substantially restricted the land use of those property owners and hence manifestly deprived them of important pre-existing property interests and rights.



It is firmly established that when the government denies or infringes an individual's property rights, the procedural protections required by due process, in order to prevent the arbitrary and capricious infringement of those rights, must normally include prior notice and the opportunity for a meaningful hearing before the responsible decisionmaking body. Thus, this Court has held that such notice and opportunity for a hearing are required before an individual's property can be garnished, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); certain public employment terminated, *Perry* v. *Sindermann*, 408 U.S. 593, 599-603 (1972); a driver's license revoked, *Bell* v. *Burson*, 402 U.S. 535 (1971); or welfare benefits terminated, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Similarly, in *Londoner* v. *Denver*, 210 U.S. 373 (1908), the Court required such protections prior to the impingement on the property interests of a discrete group of "exceptionally affected" landowners. The decision in question in that case was whether and in what amount a tax for paving a street should be levied by a local board upon the landowners abutting the street. As this Court later said, because "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, . . . it was held [in *Londoner*] that they had a right to a hearing." *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 446 (1915). In all of these situations, the Court applied the rule that before the state can restrict the property rights of an individual or even a discrete group, procedures must be followed which ensure that the decision is based on the facts and the relevant law.

Although popular elections are the cornerstone of our democratic system, it is clear that due process would not allow decisions such as were involved in the above-cited cases to be made by popular vote. Notice and

hearing ensure a decision based on the facts and the law. Popular elections, on the other hand, contain none of those safeguards and would subject the property rights in question to the standardless, unreviewable, and potentially arbitrary and discriminatory whim of the majority. As this Court stated in *West Va. State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943):

> "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Thus, the clear implication of *Eubank* and *Roberge*, when read in the context of the other cases cited above, is that zoning decisions, at least where they restrict the land use of a single property owner (as in the present case) or even of a discrete subgroup of property owners who are only a minority of the electorate (as in *San Diego Building Contractors Association et al.* v. *City Council of the City of San Diego*, No. 74-1459), must be made by a responsible body and must be preceded by notice and the opportunity for a meaningful hearing before that body.

The petitioners and the State of California attempt to distinguish *Eubank* and *Roberge* on the ground (in addition to that discussed on pp. 8-9, *supra*) that those cases involved the expression, by petition or consent, of the preference of a group of property owners in a neighborhood, and are inapplicable to a city-wide election involving *all* the voters in the city (Ptrs. Br. pp. 9-11; Calif. Br. pp. 4, 5-6). But in terms of the safeguards required by the Due Process Clause, this distinction has no relevance. The Court in *Eubank* and *Roberge* invalidated zoning restrictions imposed without notice or hearing by decisionmakers not bound by standards, because such persons were free to act "solely for their own



interest or even capriciously" (*Eubank*, 226 U.S. at 144), "for selfish reasons or arbitrarily" (*Roberge*, 278 U.S. at 122), and based on "their will or caprice" (*id.*). The same dangers are present when a zoning restriction is imposed through a popular election by the entire electorate of a city. The procedural safeguards lacking in *Eubank* and *Roberge* are equally lacking in that situation, and the decisionmakers are hence equally unbound by standards and equally free to act solely in their own self-interest, capriciously, selfishly, arbitrarily, or as a matter of taste.

This potential for arbitrary or discriminatory decisionmaking, recognized in *Eubank* and *Roberge*, is particularly apparent and dangerous when the entire electorate of a community is asked to vote on the land use of a single person or even of a discrete minority of the electorate. In that situation, the majority of electors would have the final and unreviewable authority to restrict the use of property owned by a person or group which they deem "undesirable," or to exclude such "undesirables" from the community, solely for selfish, capricious, or discriminatory motives. Indeed, in the present case, such action does not even need a majority of votes. Because Eastlake's mandatory referendum procedure requires 55-percent voter approval for a change in land use, it gives less than half the voters the standardless power to control the land use of any piece of property at their whim.

By contrast, procedural due process protections in the form of notice and the opportunity for a hearing before the responsible decisionmaking body are a vital safeguard against zoning restrictions which are ill-advised or unfair. Such notice and hearing furnish an affected property owner an opportunity to persuade the responsible municipal body that the particular restriction, as applied to him, would go farther than necessary or would

work a peculiar injustice upon him. Hence, to avoid the potential for abuse, to protect minority landowners, and to promote rationality in zoning decisions, such decisions, at least when they affect a single landowner or a discrete minority of landowners, must be preceded by notice to the affected landowner and the opportunity for him to have a meaningful hearing before a responsible body that is the decisionmaker. Due process requires such safeguards.[4]

### III. The Mandatory Referendum Procedure, Like Other Electoral Processes, Did Not Provide Adequate Notice and Hearing.

The type of notice and opportunity to be heard that is provided by the electoral process, be it mandatory referendum or otherwise, does not suffice to satisfy the due process requirements. That process and the opportunity for public debate afforded thereby do not give the affected landowner any effective or meaningful way to communicate with the decisionmakers—the electorate. Those decisionmakers, particularly where, as here, the election involves thousands of voters, are simply too diffuse and too hard to reach for the landowner to be able to present his position fully and effectively to them and thus to ensure a decision based on the relevant facts and law. In any event, as discussed above, the decisionmaking body in such a situation, the electorate,

[4] Several state courts have held that zoning decisions made without notice or hearing would deny the fundamental requirements of due process. See, *e.g.*, *Wood* v. *Town of Avondale*, 72 Ariz. 217, 232 P.2d 963, 964 (1951); *Bell* v. *Studdard*, 220 Ga. 756, 141 S.E.2d 536, 539 (1965); *Calawa* v. *Town of Litchfield*, 296 A.2d 124, 125 (N.H. 1972); *Anderson* v. *Judd*, 404 P.2d 553 (Col. 1965); *Citizens for Better Government* v. *County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973); *Glaspey & Sons, Inc.* v. *Conrad*, 83 Wash.2d 707, 521 P.2d 1173 (1974); *Edelbeck* v. *Town of Theresa*, 57 Wis.2d 172, 203 N.W.2d 694 (1973). See also *City of Scottsdale* v. *Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968).



is without expertise, is unbounded by standards, and is free to act arbitrarily, selfishly, or discriminatorily without accountability.[5]

In addition, the electoral process is extremely burdensome and involves a tremendous expense for the affected landowner. The mandatory referendum procedure in Eastlake imposes a particularly unreasonable burden in applying to every landowner seeking assent to a legislatively approved change in his zoning, no matter how minor or how obviously reasonable. As the concurring opinion in the court below stated:

> ". . . [T]he true purpose of Eastlake's charter provision . . . is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. . . .
>
> "There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.
>
> ". . . [A] law which requires a property owner, who proposes a wholly benign use of his property, to obtain the assent of thousands of persons with no such interest, goes beyond any reasonable public purpose." Pet. App. A, pp. 28-29.

[5] The inadequacies of the electoral process as a safeguard to ensure rational exercise of the zoning power are aptly described in *Taschner* v. *City Council*, 31 Cal.App.3d 48, 64 (1973):

> "It is urged that interested persons can suffer no substantial injury because the election process itself provides the equivalent safeguards afforded by state zoning law procedures. We are unpersuaded. The kind of public debate on the merits of the proposed zoning measure afforded by the election process, including the limited opportunity for the submission of written arguments to the voters, cannot be equated with a dispassionate study, evaluation and report upon the proposal by a staff of planning experts . . ., notice and hearing before the planning commission . . ., written recommendation by the planning commission with reasons for its recommendation . . ., and notice and hearing before the legislative body . . . ."

Thus, Eastlake's mandatory referendum procedure fails to satisfy the due process guidelines established in *Euclid* due to the lack of any substantial relationship between that procedure and a "reasonable public purpose." This, in itself, furnishes an alternative ground for affirming the decision below.

Furthermore, the affected landowner's opportunity, *after* the election is held, to bring suit in court challenging the rationality of the substantive zoning decision made at the election cannot suffice to cure the denial of due process. Not only would such a judicial challenge be burdensome, time-consuming, and expensive, but the landowner may well be being unlawfully deprived in the meantime of significant property interests. This Court has held it fundamental in such situations that the notice and hearing must precede the infringement of the property rights. See *Bell* v. *Burson, supra*, at 542: "it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved [a property interest in retaining a driver's license], it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective" (emphasis by Court). To the same effect are *Goldberg* v. *Kelly, supra*, at 260-66, and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc., supra*, at 606.

Finally, any hearing afforded the respondent before the municipal planning commission or city council in the present situation was not sufficient. In order to be meaningful and effective, the hearing required by due process must be before the ultimate decisionmaker. Neither the planning commission nor the city council was the ultimate decisionmaker here, and the result of their processes could be—and in fact was—nullified through the electoral process, which itself, as we have shown, failed by



its nature to provide adequate notice and opportunity for a meaningful and effective hearing.[6]

In sum, it is clear that Eastlake's mandatory referendum procedure was no substitute for the opportunity to have a hearing before a responsible body that was the final decisionmaker. That procedure therefore denied the respondent due process of law.[7]

### IV. This Court's Decision in *James* v. *Valtierra* Is Not Applicable Here.

In arguing that the mandatory referendum procedure involved here did not deny due process, the petitioners and California rely heavily on *James* v. *Valtierra*, 402

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[6] We note that in *San Diego Building Contractors Association et al.* v. *City Council of the City of San Diego*, No. 74-1459, wherein amici are appellants, the procedure used to rezone a relatively small geographic area of the City of San Diego was an initiative election. No hearings regarding such rezoning were ever held before the municipal planning commission or city council, and the individual owners of the property affected were given no opportunity to present their views other than through the ineffectual and prohibitively expensive means available in an election in which hundreds of thousands of voters participated. The use of the initiative, under the circumstances of that case, totally deprived the affected property owners of any opportunity for reasonable notice and a meaningful hearing.

[7] The Cities of Garfield Heights et al., as amici curiae, claim that this contention, and the holding of the court below, that the electoral process was inadequate in the present situation to satisfy the requirements of due process denies the "cherished" constitutional "right to vote" (Garfield Br. pp. 2-3). We note, however, that, as pointed out by Justice Stewart:

> "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. [Citations omitted.] *But there is no constitutional right to vote, as such. Minor* v. *Happersett*, 21 Wall. 162. If there were such a right, both the Fifteenth Amendment and the Nineteenth Amendment would have been wholly unnecessary." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 59 n. 2 (1973) (Stewart, J., concurring). (Emphasis added.)

U.S. 137 (1971), where this Court upheld a state constitutional provision that no low-rent housing project should be developed by a state public body unless the project was first approved in a referendum by a majority of those voting at a community election (Ptrs. Br. pp. 15-17; Calif. Br. pp. 6-7). That decision, however, is not contrary to the position we have advanced above. Unlike the present case, the suit there was not brought by a specific property owner who was challenging on due process grounds a mandatory referendum procedure applicable to each and every zoning change in the city. Rather, the suit was brought by citizens eligible for low-cost housing, and their primary challenge to the provision involved was that it discriminated against low-income persons in violation of the Equal Protection Clause. 402 U.S. at 140-143.[8] Thus, in rejecting that attack, the Court did not reach or consider questions as to the necessity for notice and the opportunity for a hearing or as to whether a referendum procedure such as that involved here violates the Due Process Clause.

In any event, the referendum provision in *James* was significantly different from the procedure in question here. The mandatory referendum procedure involved in *James* was required only for the state or local *government's* development of low-cost *public* housing projects, thus making such government the primary property owner whose land use was subject to the referendum procedure.[9] And where the state or its subdivision is the

[8] The plaintiffs also claimed that the provision violated the Supremacy Clause and the Privileges and Immunities Clause, but the Court dismissed these contentions with very little discussion. 402 U.S. at 140.

[9] Similarly, the other mandatory referendum procedures to which the Court in *James* compared the one in question—*e.g.*, those for approval of state constitutional amendments, for the issuance of certain bonds by local governments, and for certain municipal territorial annexations (402 U.S. at 142)—were all applicable only to actions of state or local governments.



landowner whose property rights are restricted through the challenged procedure, that procedure cannot have constituted a denial of due process, because the state has no constitutional right to due process. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966). Moreover, as the court below recognized (Pet. App. A, pp. 24-25), the expenditure of governmental funds and the interest of the community as a whole are likely to be greater in the case of governmental development of a public housing project than in every case of a zoning decision, no matter how small, regarding the permissible use of the real property of a single private landowner. For these reasons, even apart from the fact that *James* did not involve or consider due process claims or issues, that decision should not be applied to validate a mandatory referendum procedure that is required prior to any change in the permitted use of property owned by a *private* landowner.

The *James* decision, therefore, is no bar to the conclusion that, because of the lack of adequate notice and opportunity for a meaningful hearing, the Eastlake mandatory referendum procedure, as applied in the present case, infringed the respondent's property rights without due process of law.

## CONCLUSION

For all these reasons, amici respectfully urge this Court to affirm the decision of the Supreme Court of Ohio holding that Eastlake's mandatory referendum procedure violated the respondent's constitutional rights under the Due Process Clause.

Respectfully submitted,

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